AS

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

By HENRY HILTON,
ONE OF THE JUDGES OF THE COURT.

VOLUME II.

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REPORTER'S NOTE.

ALL the cases on appeal, reported in this volume, were heard and decided at General Term, held by all the judges composing the court.

The Special Term and Chambers cases were decided by the judge delivering the opinion, without consulting his colleagues upon the questions presented, except in two instances, which appear from the report.

JUDGES

OF THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK,

SINCE ITS RE-ORGANIZATION IN 1821,

WITH THE YEARS IN WHICH THEIR OFFICIAL TERMS ORIGINALLY COMMENCED.

JOHN T. IRVING, ... 1821
MICHAEL ULSHOEFFER, . . 1834
DANIEL P. INGRAHAM, . . . 1838*
WILLIAM INGLIS, ... 1839
CHARLES P. DALY, ... 1844
LEWIS B. WOODRUFF, . . . 1850†
JOHN R. BRADY, ... 1856
HENRY HILTON, ... 1858

Judges during the Period embraced in these Reports

CHARLES P. DALY, FIRST JUDGE.
JOHN R. BRADY, } JUDGES.
HENRY HILTON, }

* Elected to the Supreme Court.
† Elected to the Superior Court.

CASES REPORTED IN THIS VOLUME.

CASES

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LOUIS F. THERASSON *v.* THOMAS MCSPEDON.

A denial in an answer, "upon information and belief," is no traverse. The effect of such a form of denial is to admit the fact in the complaint to which it relates.

The defendant, as a condition of the purchase by him of all the property of a mining company, of which he was treasurer, agreed to pay its liabilities, and to pay the shareholders a specified amount for each share. *Held*, in an action brought by the plaintiff, claiming under an assignment of the interest of one of the shareholders,

I. That the promise of the defendant enured to the benefit of every shareholder and creditor of the association, and entitled any one of them to maintain an action upon it.

II. That the promise was not to pay the debt of another, but a promise to pay his own debt incurred by the purchase of the property.

APPEAL from a judgment entered on the report of a referee. The plaintiff sued as assignee of certificates of stock in the "Greenwich and California Mining and Trading Company," an unincorporated association. His complaint averred that the assets of the company had been sold, and the proceeds delivered to defendant, as treasurer of the company, and that defendant had promised to pay over the fund to the shareholders at the rate of $189.96 per share. It also averred the transfer of certain shares to the plaintiff.

The defendant's answer, among other things, denied, on information and belief, that the shares mentioned in the complaint had been assigned to the plaintiff.

On the trial before the referee, the defendant moved to dismiss the complaint, on the ground that the consent of the company to the transfer was not shown. The referee denied the motion, and the defendant excepted.

The promise of defendant to pay the fund in the treasury to the shareholders, in the proportion of their shares, appeared not to have been in writing.

The referee having reported in favor of the plaintiff, the defendant appealed.

Daniel B. Taylor and *John W. Edmonds*, for the appellant.

The undertaking of defendant was to pay the debt of a third person, and, not being in writing, is void.

John Graham, for the respondent.

I. The Code does not authorize a denial on information and belief. Code, § 149; DALY, J., *Hacket* v. *Richards*, 11 Leg. Obs., 315; *Truscott* v. *Dole*, 7 Pr. R. 221; Voorhies' Code, ed. of 1855. p. 193.

II. When stock is actually assigned, it transfers all the right of the assignor, although not entered on the books, nor any notice given of it. The purchaser has all the right to the stock, but may or may not be entitled to vote; and the sale of the stock may be subject to the debts of the corporation. *Gilbert* v. *Manchester Iron Co.*, 11 Wend. 627; *Bank of Utica* v. *Smalley*, 2 Cow. 770. And in *Stall* v. *Catskill Bank* (18 Wend. 475), it was held that all the right of the assignor is divested by the assignment, although it is informal, and not consistent with the by-laws. *Mechanics' Bank* v. *New Haven Railroad*, 3 Kernan, 599.

These decisions are in the cases of *strict corporations*, which are controlled by the legislature. The rule is less rigid in the case

of a company like the one in question, which has no right to impose restraints on the alienability of property. It is not a corporation, but is in the nature of a mere copartnership.

III. The undertaking of the defendant to pay a certain amount per share, and also the debts and liabilities of the company, in consideration of the transfer to him of the ownership of its property, was valid, and the objection that it was not in writing, is not well taken.

(*a*) It was nothing more than an undertaking or promise by the defendant to pay each shareholder or his representative, and each creditor, what in reality belonged to him, out of funds or property which came to the hands of the defendant—first as treasurer, and afterwards in his individual capacity—and which funds and property formed the basis of such undertaking or promise.

(*b*) It was not necessary that it should be in writing. It was an *original undertaking* on the part of the defendant. The statute only applies where the party making the promise stands in the relation of surety for some third person, who is the principal debtor. 2 R. S. (3d ed.) 195, § 2, sub. 2; *Johnson* v. *Gilbert*, 4 Hill, 178.

By the Court, DALY, First Judge.—The endorsement and transfer of the certificate with the consent of the company, was averred in the complaint, and not denied by the answer. A denial upon information and belief, is no traverse. The defendant must aver that he has no information or knowledge sufficient to form a belief. The fact was therefore admitted, and the motion for a nonsuit was properly denied.

The promise of McSpedon was, not to pay the debt of another, but a promise to the association to pay his own debt incurred by the purchase of the property of the association. This promise enured to the benefit of every shareholder and creditor of the association, and entitled any one of them to maintain an action upon it against the defendant. *Barker* v. *Bucklin*, 2 Denio, 45.

The other questions in the case, so far as they were material,

were questions of fact upon conflicting testimony, in respect to which the finding of the referee was conclusive.

Judgment affirmed.

NOAH S. DAY *v.* CONRAD SWACKHAMER.

In an action, brought by the assignee of the lessor against the lessee, to recover rent on a covenant in the lease, the defendant cannot show a breach by the original lessor of a parol agreement to make repairs, entered into subsequent to the making of the lease.

The liability of an assignee of a lease upon the covenants real annexed to the estate and running with the land, (under 1 Rev. Stat. 747, §§ 23, 24, 25,) extends only to covenants broken while he remains possessed of the estate. He is not chargeable for a breach of covenant which happened previous to the assignment.

In an action brought by the assignee of the lessor, against the lessee, to recover rent on a covenant in the lease, defendant offered to show that, during his occupancy, he did not have possession of a part of the domised premises; but this fact was coupled in the offer with an agreement by the lessor as to the allowance to be made for defendant's damages in that behalf.

Held, that, from the offer thus made, it appeared that the deprivation occurred during the defendant's occupancy under the original lessor, and that the evidence was properly excluded. The offer should have been, to show an exclusion since the assignment to the plaintiff.

APPEAL from a judgment of the District Court for the first judicial district. The action was brought to recover one quarter's rent of premises consisting of the second floor of a house, "with a privilege in the yard." These premises were hired by defendant from A. & S. H. Campbell. The details of the lease, which was under seal, are given in the opinion of the court. The Campbells assigned their lease to one Stevenson, and he to the plaintiff, who brought this action to recover for a quarter which commenced subsequent to the assignment to him.

On the trial, defendant offered to show that the yard was so out of repair that he could not use it—that the Campbells offered to repair it so that he could have the privilege in the yard stipulated in the lease; and that defendant took possession by reason

of this promise on the part of the Campbells, and the Campbells received rent on the condition that the yard should be repaired, and, if not repaired, two quarters of the rent should be deducted in case defendant continued to occupy during the whole lease.

The plaintiff objected to this evidence, and it was excluded.

Defendant then offered to prove that, during the time he occupied the premises, he did not have the privilege in the yard mentioned in the lease; and that it was agreed between the defend ant and the Campbells, and before the Campbells' assignment of the lease to Stevenson, that all damages sustained by defendant, through his not having the privilege of the yard, should be deducted from the two quarters' rent last accruing under the lease; and that defendant sustained damage, by not having the privilege of the yard, to the amount of $200. The plaintiff objected to this unless it were shown by a written agreement under seal, and the objection was sustained.

The justice having rendered judgment for the plaintiff, the defendant appealed.

H. D. Birdsall, for the appellant.

G. & T. Stevenson, for the respondent.

By the Court, BRADY, J.—The defendant hired from A. & S. H. Campbell, on the 28th March, 1854, by agreement under seal, the second floor, including a small room at the head of the stairs, of the house known as 123 Chambers-street, in the city of New-York, with a privilege in the yard—the Campbells agreeing that the walls in the front and back rooms should have one coat of paint, and that the back windows should be straightened; and the defendant agreeing that he would make all other repairs or alterations at his own expense. The Campbells assigned the defendant's agreement to one George Stevenson, by assignment bearing date Sept. 16, 1854, and Stevenson assigned it to the plaintiff by assignment bearing date Dec. 2, 1856. The action was brought to recover for one quarter's rent of the premises due

1*st May*, 1857. On the trial, the defendant sought to establish a defence by showing breaches of agreements made when the Campbells and Stevenson held the lease, but not resting in covenant or in writing, and of which the plaintiff had no notice; and promises by them to indemnify him for damages sustained in consequence thereof.

The evidence of these facts was properly excluded by the court below. An assignee is bound by the covenants real annexed to the estate, and running with the land, (1 Rev. Stat. 747, §§ 23, 24, 25,) but his liability extends only to covenants broken while he remains possessed of the estate. *Armstrong* v. *Wheeler*, 9 Cow. R. 88; *Taylor* v. *Shum*, 1 B. & P. 21. He is not chargeable for a breach of covenant which happened previous to the assignment to him. *Church Wardens of St. Saviours Southwark* v. *Smith*, Burr. 1271; *Grescot* v. *Green*, 1 Salk. 199. The only covenants which appear in the agreement sued on, affecting the assignee, aside from the demise, are the agreements to paint, and the agreement to straighten the windows. The defendant covenanted to make all other repairs and alterations at his own expense. There is evidence on both sides conflicting in its character as to the performance of the covenant to straighten the windows, and the painting seems to have been done. On this branch of the case, therefore, there is nothing in the return which would warrant the interference of this court. The defendant must seek redress against the Campbells and Stevenson on their promises to indemnify, which in no way bind the plaintiff. There is, however, an offer to prove a fact, which, if it had been properly presented, and an exception to the ruling of the justice excluding it properly taken, would avail the defendant on this appeal.

He offered to show that, during the time he occupied the premises, he did not have the privilege in the yard granted by the demise, but it was coupled with an agreement between the Campbells and himself as to his allowance for damages sustained thereby, and the time when they should be deducted. From the offer thus made, it appears that the deprivation of the privilege in the

yard occurred during the time when the Campbells were his land lords, and not during the period that the plaintiff held the lease. It was therefore properly excluded by the justice. If the offer had been to show that the defendant had not had the privilege in the yard during the time which had elapsed from the assignment to the plaintiff, we cannot say but that the proof would have been admitted. The case shows no violation of any agreement by the plaintiff, or any offer to show any violation by him of any covenant or agreement he was bound to keep.

Judgment affirmed.

THE MAYOR, &c., OF THE CITY OF NEW YORK *v.* JOSEPH HUSSON.

The power conferred upon the clerks of justices' courts (see Laws 1840, chap. 170,) in the absence of the justice at the time to which the trial has been adjourned, to further adjourn it without the appearance or consent of the parties, cannot be exercised until the hour has arrived at which the trial has been fixed.

Where, on the day fixed for the trial, but before the hour appointed, and after the justice had left the court for the day, the clerk, without the knowledge of the defendant, adjourned the cause to a future day, at which time, the defendant not appearing, the plaintiff proceeded to trial and judgment,

Held, that, the adjournment by the clerk being unauthorized, it operated as a discontinuance of the action; and, at the time of the trial, the cause was out of court, and the justice had lost jurisdiction to proceed.

APPEAL, by the defendant, from a judgment against him rendered by the Third District Court. The facts appearing by the return are sufficiently stated in the opinion.

Samuel F. Clarkson, for the appellant.

George H. Purser, corporation attorney, for the respondents.

By the Court, HILTON, J.—This is an appeal, by the defend-

ant, from a judgment entered against him in the Third District Court under the following circumstances. The suit was commenced by warrant. The defendant appeared, and issue was joined June 16th, 1857. The trial was then adjourned to the 20th (then) instant, at 11 o'clock A. M., when the parties appeared, and a further adjournment was made to the 25th June, at 3 o'clock P. M., at which time the defendant appeared with his witnesses, and neither the justice, or clerk, or plaintiff's counsel, were present. He waited until the court room was closed, and only departed after being informed by the constable in attendance that the justice had left, and no court would be held on that day. It appears that, at some time before 3 o'clock P. M. on the 25th, but after the justice had left the court, the clerk, without the knowledge of the defendant, adjourned the trial to the 29th of June, at which day, the plaintiffs appearing, and the defendant not, the justice proceeded with the trial and rendered judgment for the plaintiffs.

In the absence of the justice at the *time* to which the trial had been adjourned by him, the clerk was authorized to further adjourn the cause to the 29th, without the consent of the parties, and without their appearing. 2 R. S. (4th ed.) 434, § 45; Laws of 1840, ch. 170, p. 123. But this power could not be exercised by the clerk in the absence, or without the consent, of both parties, until the hour had arrived on the 25th of June to which the trial had been postponed.

The adjournment by the clerk, being unauthorized by law, amounted to a discontinuance of the action, and, at the time of the trial, the cause was out of court, and the justice had no jurisdiction to proceed in it. *Proudfit* v. *Hurmans*, 8 John. 391; *Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43; *Redfield* v. *Florence*, 2 E. D. Smith, 339; *Hunt* v. *Wickwire*, 10 Wend. 102.

Judgment reversed.

EMANUEL HELLMAN *v.* JULIUS STRAUSS.

An action may be maintained to recover back a part payment made upon an executory contract by parol for the sale of land, where the purchaser was induced to enter into the contract by a false representation by the vendor as to a material fact.

Whether such an action can be maintained where the contract is free from fraud, and the vendor is able and willing to perform,—*quære?* Per DALY, *First Judge.*

APPEAL from a judgment of the Marine Court. The complaint stated that the plaintiff and defendant entered into a parol agreement for the sale of a house by defendant to the plaintiff; that plaintiff was induced to enter into this agreement by the false and fraudulent representation by defendant that he, defendant, had seen Mr. Julius Wadsworth, the agent of the person who held a mortgage on the house, and that he had told defendant the mortgage would not be called in for several years, in case the interest was paid; and that, relying on this statement, plaintiff was induced to pay to the defendant the sum of $500, which he now claimed to recover back.

On the trial in the Marine Court the plaintiff recovered judgment, which was affirmed by the general term of that court on appeal. From that judgment of affirmance, the defendant appealed to this court.

A. J. Perry for the appellant. I. An executory agreement by parol, for the conveyance of land, is not an illegal contract. It is only such a contract as cannot, before any part performance, be enforced, either party objecting. *Abbott* v. *Draper*, 4 Denio, 51. II. The part performance of the contract by plaintiff, in the payment of $500, gave him no right to other than the stipulated consideration therefor until, or unless, defendant be in default. *Greenby* v. *Cheevers*, 9 J. R. 126; *Ellis* v. *Haskins*, 14 J. R. 363; *Hudson* v. *Swift*, 20 J. R. 24; *Fuller* v. *Williams*, 7 Cowen, 58. III. The plaintiff having voluntarily paid money in part performance of a contract not unlawful to be made, cannot recover it back

while defendant is willing to complete. *Battle* v. *Rochester City Bank*, 3 Com. 92; *Dowdle* v. *Camp*, 12 J. R. 451; *Abbott* v. *Draper*, 4 Denio, 51. IV. The contract was as well for the sale of chattels as real estate. A distinct price was placed upon each. The agreement is divisible, and the court will uphold it as a contract for the sale and delivery of chattels; the facts bringing that part of the contract clearly within the rule upholding the sale of chattels.

Pinney & Postley, for the respondent. I. The plaintiff claims to recover upon two grounds: 1st. Fraud on the part of the defendant, in obtaining the contract and money; 2d. Upon the ground that the contract was within the statute of frauds. The evidence sustains both positions. The case is clearly within the statute of frauds, and the plaintiff's action for the money paid is maintainable. *Burlingame* v. *Burlingame*, 7 Cowen, 92; *King* v. *Brown*, 2 Hill, 485.

II. If the law is against the plaintiff, the question of fraud was a question of fact, and the verdict ought not to be disturbed. Fraud avoids all contracts.

By the Court, DALY, First Judge.—It was held in *Dowdle* v. *Camp* (12 John. 451), that money, paid as part of the purchase money upon a parol contract for the sale of land, could not be recovered back, as the contract, though not binding upon the parties, was not illegal at its inception; and, there being a part performance by the payment of part of the purchase money, a court of equity would compel a conveyance. But, in *Rice* v. *Peet*, (15 John. 503,) the plaintiff, in an action for money had and received, recovered the amount of a note which had been given by him to the defendant, as a pledge or security for the performance of a parol contract for an exchange of farms; the money upon which note had been obtained by the defendant; although the plaintiff failed to perform his part of the agreement; the court assigning, as one of the grounds for its judgment, that the money was received by the defendant without consideration—the agree-

ment by parol for the exchange of farms being void by statute. The ground assigned in this case was recognized in *Burlingame* v. *Burlingame* (7 Cow. 92) without objection, and the rule or principle deducible from it, was declared, in *King* v. *Broom* (2 Hill, 485), to be, that as the contract is void, and incapable of being enforced in a court of law, the party paying the money in pursuance of it, may treat it as a nullity, and recover the money back. In *Abbott* v. *Draper* (4 Denio, 51), it was held that the plaintiff, who had delivered goods in part performance of a parol contract for the purchase of land, and who had entered upon the possession of the land, could not recover for the goods until he had restored the possession of the land to the defendant and demanded back what had been advanced upon the contract. BRONSON, Ch. J., went further, and declared that, as long as the vendor is not in default, but is ready to perform the contract on his part, the vendee could not recall a payment made upon the parol agreement. The reasoning of the learned chief justice is that, as the vendor is not in the wrong, but is able and willing to perform, he cannot be regarded as holding the money as debtor, but as owner; that the consideration upon which it was paid has not failed, and a promise to repay it cannot therefore be implied.

Without expressing any opinion as to the correctness of this view of the law, it is sufficient, for the disposition of the case now before us, to say that a material representation was made by the defendant Strauss to the plaintiff, when the parol agreement was made for the purchase of the house and lot, that is, that the defendant had seen the agent of the owner of the mortgage subject to which the conveyance was to be made, a few days before, in Wall street, and that he, the agent, said that the mortgage could lay as long as the interest was paid. That this was deemed material by the plaintiff, appears from his declaring, when the agreement was entered into, and the $500 paid as part of the purchase money, that he wanted the mortgage to lay five years. The agent testified that he had not seen the defendant, and had made no such statement to him; but the agent informed the plaintiff that $2,000 upon the mortgage would have to be paid in the spring, and that

the residue might remain for three years. Witnesses were called by the defendant, who testified that he did not say that he had seen the agent, and that he merely stated that he presumed that the mortgage could lay as long as the interest was paid; but, upon this conflicting evidence, the finding of the court below is conclusive, and it must be assumed here that the defendant made the statement attributed to him by the plaintiff's witnesses. The right of the plaintiff to repudiate the agreement, and demand the return of his money, upon learning that the statement was untrue, and that $2,000 would have to be paid upon the mortgage in a month, and the balance in three years, is a proposition so plain, that it needs but to be stated. The agreement, being by parol, was not binding upon him, and it would be preposterous to hold, that because he made a partial payment under such a contract, that he must either forfeit what he has paid, or accept a conveyance of the premises burthened with obligations which he never contemplated, and against which he expressly provided. The cases above referred to, which are relied upon by the appellant, afford no countenance for a construction of the law so palpably inequitable and unjust.

Judgment affirmed.

JOHN COOPER and JOHN B. COOPER *v.* WILLIAM W. KINNEY and others.

In an action commenced in the Marine Court by a summons which required the defendants to answer "a complaint for a money demand on contract," the plaintiffs, on the return of the summons, the defendants having appeared, applied for leave to amend it by substituting the words "an injury to personal property" for "a money demand on contract." The court permitted the amendment, and the defendants excepted.

Held, on appeal, that permitting the amendment was an act of discretion on the part of the court below, which was not properly the subject of review.

APPEAL from a judgment of the Marine Court. The facts are sufficiently stated in the opinion.

R. Winne and *F. Hughson*, for the appellants.

J. R. Flanagan, for the respondents.

By the Court, HILTON, J.—This action was commenced by the issuing of a summons, requiring the defendants to answer to "a complaint for a money demand upon contract." On the return of the summons the parties appeared, and the plaintiffs then applied to the court for leave to amend the summons by striking out the words "a money demand on contract," and inserting, in lieu thereof, "injury to personal property," and thus change the character of the action from contract to tort. The court permitted the amendment, and the defendants excepted "on the ground that the court had no power to amend process after it had once issued."

Every court has power to amend its process and proceedings, (2 R. S. 424, § 1,) and courts of record have this power not only conferred upon them by express enactment, (Code, § 173,) but are required "to disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party." Code, § 176. This being the rule in courts where formerly adherence to strict form has often been deemed essential, there certainly exists no reason for the application of a more stringent practice than has heretofore prevailed upon this subject in justices' and other inferior courts.

It has always been their duty to allow such amendments as will promote substantial justice between the parties; and in this case, the court having jurisdiction of the parties to, and subject matter of, the action, permitting the amendment was an act of discretion which will not be reviewed by us. Code, § 336; *Colvin* v. *Corwin*, 15 Wend. 557; *Brace* v. *Benson*, 10 Wend. 218; *Fulton* v. *Heaton*, 1 Barb. S. C. 552.

Judgment affirmed.

ELIZABETH DOWNS *v.* JOHN MCGLYNN.

In an action against a constable for failure to return an execution issued to him, and to pay the amount collected, it appeared that the defendant, after receiving the execution, delivered it to another constable, who made the money upon it, and offered it to plaintiff, less a certain sum which plaintiff had agreed to pay him for making the collection.

Held, that, notwithstanding these facts, the plaintiff was entitled to recover.

When an execution is duly issued to a constable, it becomes his duty to execute it in person. He has no power to substitute another constable in his place.

A bargain between the plaintiff in an execution, and the officer holding it, for the payment of a compensation beyond that allowed by law for the collection, is void.

Whether, under section 57 of the District Courts Act (1 Laws of 1857, 707), a constable is liable for a mere neglect to return an execution, where he has not made anything upon it, *quære*.

APPEAL, by plaintiff, from a judgment of the Sixth District Court. The defendant was a constable of the court, and was sued for neglect to return an execution issued to him in favor of the plaintiff. The facts are fully stated in the opinion.

Henry Coulter, for the appellant.

Diefendorf & Aikin, for the respondent.

By the Court, BRADY, J.—The defendant was sued for neglecting to return an execution, issued to him as a constable from the Sixth District Court of this city, in favor of the plaintiff. The defendant admitted the receipt of the execution, and that he had not returned it, but sought to shield himself from liability by showing that he delivered it to another constable named Cushing, who, after he had received it from the defendant, collected the amount, and, it seems, offered it to the plaintiff, less $10, which she agreed to pay Cushing if he collected the amount saving her from all risks of replevin, &c. The plaintiff objected to the proof of the witness Cushing, but no exception was taken to the decision

of the justice overruling the objection. It also appeared, by the testimony of the defendant, that he had never requested Cushing to pay the plaintiff the money, or to pay it into court. The 57th section of the act relating to the district courts (1 Laws of 1857, 707, § 57) provides that a constable shall be liable to a party in whose favor an execution is issued to him, for the amount thereof, "when he suffers the twenty days to elapse without making a true return thereof, and filing the same with the clerk of the court, and paying to him, or to the party entitled thereto, the money collected thereon by him." The plaintiff based her action on the section referred to, and was entitled to recover. Section 52 of the act of 1857 provides that the execution issued out of the district courts must be directed to a constable of the city of New York, and, when this has been done, it is hardly necessary to state that it becomes the duty of the constable to execute it diligently, and according to law. He is not gifted with the power of substitution, and cannot shake off the burden of discharging his duty. He may do so, perhaps, by consent of the party in interest; but the courts would look with jealousy upon such a proceeding, to see that no undue advantage was taken of the judgment creditor. In this case, when the transfer of the process was made by the defendant, the constable, Cushing, to whom it had been given, proceeded to make a void bargain (*Hatch v. Mann*, 15 Wend. 44) for the price to be paid for collecting it, and, it would seem, as before stated, after he had made the money, offered it to the plaintiff, less the amount to be paid him under the agreement. Neither he nor the defendant paid the money into court, and thus this case furnishes an illustration of the evils to spring from any rule other than that holding these officers to a strict accountability. The defendant possessing no power to delegate his trust to another, and the money having been made on the execution delivered to him, the presumption of law is that he made it under and by virtue of the execution, and, having failed to return it, and to pay over, his liability was consummated. He must look to his deputy for indemnity, and cannot complain if he fails to acquire it in that direction. There

may be some doubt whether, under the 57th section considered, a constable is liable for a mere neglect to return an execution, not having made anything upon it, but that question does not necessarily arise. The money was made in this case, and the defendant must be subjected to the legal maxim "*qui facit per alium facit per se.*"

Judgment reversed.

VARNUM S. MILLS *v.* ISAAC G. PEARSON.

To maintain an action on contract, it must appear that the plaintiff is the only person possessed of any ownership or interest in the demand; so that, on a recovery and subsequent payment, all rights of action in respect to it will be barred as against the defendant.

Where plaintiff sued as assignee of a demand which originally accrued to two partners, but the assignment proved was executed by but one of the partners, and purported to transfer only *his* "right, title, and interest" in the claim, and there was no proof that the partnership had been dissolved, or that the claim was ever vested in the partner making the assignment, or that the other partner had ever done any act which would estop him, or would vest his interest in the assets of the firm in his partner, *held*, that the plaintiff could not maintain his action.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment of a single justice of that court. The action was brought to recover for goods sold and delivered, and judgment was rendered in favor of the plaintiff. The grounds of the action, and of the defence, appear in the opinion.

Emerson & Prichard, for the appellant.

O. R. Steele, for the respondent.

By the Court, HILTON, J.—The plaintiff sues to recover the value of a dome light furnished a house in Tenth street, built for Mr. Lanier by James Owens, and of which the defendant was the

architect. The dome was purchased of the firm of Sharp & Steel, who manufactured it, and put it up, *as is claimed*, at the request of, and for, the defendant. There was no question as to the delivery of the dome light, or its value; but the defendant insists: 1st. That the demand sued upon belonged to the firm of Sharp & Steel, and the plaintiff has not acquired such a right to it as enables him to maintain an action alone to recover upon it; 2d. That, on the question whether the defendant, in purchasing the dome light, was the agent of the builder, James Owens, the court erred in rejecting the offer of the defendant to show by competent evidence that Owens was bound to furnish the dome light, and had been actually paid for it by the owner, Lanier.

The plaintiff, at the trial, proved an assignment made to him in the following words:

"NEW YORK, March 10th, 1857.

"This is to certify that *I, Henry Sharp*, of the city of New York, have this day sold *my* claim, right, title, and interest in a certain debt of sixty dollars due *me* by Mr. I. G. Pearson, architect, of said city, to wit: For one dome light of stained glass, executed and delivered, as per order of said architect, to Mr. Varnum S. Mills, for the sum of fifty dollars to *me* in hand paid, receipt of which is hereby acknowledged.

HENRY SHARP."

Sharp was then offered as a witness, and testified that he was one of the firm of Sharp & Steel; that the dome light was purchased of, and made by, them; that *he* had executed and delivered the assignment for the consideration expressed in it; that the firm had never been formally dissolved; that he had nothing to show from his partner, Steel, respecting the dissolution of the firm, or any transfer of this claim to him; that no entry upon either subject is contained in the books of the firm; that he took the business and the bills, and paid Steel off; and that Steel had gone to Europe.

To entitle the plaintiff to maintain this action, it was necessary for him to show, by competent and conclusive evidence, that he

was the only person possessed of any ownership or interest in the claim sued on, so that, upon a recovery and subsequent payment, all rights of action in respect to this demand would be barred as against the defendant.

Was the evidence in support of the plaintiff's right of action of this nature? Was it such as would be an effectual bar against any subsequent claim of Mr. Steel?

There was no evidence that the firm had ever been dissolved, nor that this claim ever belonged to the witness Sharp individually, of such a conclusive character as would prevent the copartner Steel maintaining an action similar to this. No act of Steel was shown which would conclude him from denying either of these propositions, or would vest his interest in the assets of the firm in his copartner Sharp.

To permit the plaintiff to recover upon such evidence, would be a violation of the familiar rule which requires all the parties living, and having the legal interest in a joint contract, to join in an action brought upon it,—a rule not only just in itself, but which should be adhered to, for the reason that if several parties were allowed to bring actions for one and the same cause, the court would be in doubt for which to give judgment. 1 Chitty on Pleading, 5, 6; Collyer on Partnership, § 649; *Dob* v. *Halsey*, 16 John. 34. Whether, if Sharp had, subsequent to the dissolution, signed the name of the firm to a transfer of this claim, the action might have been maintained in the name of the assignee, it is not necessary here to determine; as the assignment offered is not so signed, nor does it purport to sell or transfer anything beyond the *individual* "right, title, and interest" of *Sharp* to the debt in question.

The evidence of the right of the plaintiff to sue *alone* was *not* sufficient, and the defendant's motion at the trial to dismiss the complaint on the ground of the non-joinder of William Steel, should have been granted.

This conclusion renders it unnecessary to examine the remaining ground of appeal.

Judgment reversed.

CHARLES PLACE, JR., *v.* THE UNION EXPRESS COMPANY.

Express companies who receive and agree to transport goods or packages from place to place for hire, in the ordinary and approved means of conveyance, are common carriers, although they are not owners of, nor interested in, the conveyances by which the goods are transported,—disapproving *Hersfield* v. *Adams*, 19 Barb. 577.

A forwarder is one who, for a compensation, takes charge of goods entrusted or directed to him, and forwards them; that is, puts them on the way to their place of destination by the ordinary and usual means of conveyance, or according to the instructions he receives. His compensation is limited to his care and trouble, and the charges paid by him in receiving, keeping, and duly forwarding; and, when he has placed the goods in the course of transit by the proper conveyance, his duty is at an end. He has no interest in, and receives no part of the compensation paid for the carriage and due delivery of the goods.

A common carrier is one who, for a reward, undertakes to carry goods for persons generally, as a public employment. It is the receipt of, or the right to, the freight or charge for the carriage of goods, together with the public nature of their employment, that constitutes them common carriers.

The U. Express Co. received certain boxes of fruit, which they agreed, by a receipt in writing, to deliver at the depot at M. within twelve days, on payment of freight, stipulating against accidents and casualties beyond their control, and particularly that their guaranty of special dispatch should not cover cases of unavoidable or extraordinary casualty. They also stipulated that fruit should be at the owner's risk of transportation, loading, and unloading; that they would not be liable for injury to any articles of freight, during the course of transportation, occasioned by the weather, or accidental delays, or natural tendency to decay; that they would pay five cents per 100 pounds for each day the goods were delayed beyond contract time, and that all claims for damages, &c., should be presented for settlement at their office in New York. They shipped the fruit so received to M., the place of its destination, *via* the N. Y. C. RR. and the G. W. RR., with which roads alone they had any arrangements for transportation. For nearly two months prior to their taking the fruit in question, the G. W. RR. Co. had been unable to receive freight as fast as the N. Y. C. RR. delivered it, and, in consequence, there was a great accumulation of it, and a delay of at least ten days, on the average, in the transportation. The fruit in question was, in consequence, delayed over twenty days upon the route, and was nearly ruined by decay when it reached M. There was another road by which the fruit might have been sent, but the U. Express Co. had no arrangements for transportation with that road. In an action against the U. Express Co. to recover damages for the injury to the fruit, *held*,—

I. That the defendants' agreement to deliver the freight received, according to the

conditions of their tariff, classification, and rules, rendered them liable as common carriers for the safe carriage and delivery of the goods, and subjected them to the liability incident to that employment, except so far as it was limited by express stipulation.

II. That proof by the consignee that he did not receive the goods within the time specified, coupled with evidence that a part of them did not arrive, was sufficient evidence of the failure of the defendants to deliver at the depot at M., to throw on them the *onus* of showing when the fruit did arrive at the depot. It was a matter peculiarly within their knowledge, and slight evidence on the part of the plaintiff was therefore sufficient to throw on them the burden of proof.

III. That the defendants were liable for the decay of the fruit. The clause providing that they should not be liable for natural decay, must be understood as applying to decay to which the fruit might be subject during the prescribed time within which the defendants undertook to deliver it at M., not to such as was occasioned by the defendants' delay.

IV. That the clause providing that the defendants should pay five cents per 100 pounds for every day the goods were delayed beyond the time fixed by the contract for delivery, did not limit the liability of the defendants thereto. They were liable in that amount whether the plaintiff suffered any loss by the delay or not, and were also liable for any actual damage to the fruit occasioned by such delay. That clause in the agreement applied only to cases where the property was delivered uninjured, but after the contract time.

V. That it was not necessary for the plaintiff, as a condition precedent to the defendants' liability, to present the claim for settlement to them, at their office in New York. In order to avail themselves of any defence arising under the clause of the contract providing for such demand, it was necessary for them to plead a readiness to pay the amount of damages at such place, and follow it up by a tender of the amount in court.

VI. That the facts shown as being the cause of the delay did not prove that it was the result of an accident or casualty beyond the defendants' control. It was their duty to have known the conditions and possibilities of transportation upon the routes over which they were accustomed to transport their goods, before entering into a contract to deliver within a specified number of days; especially so when the cause of the detention was a disarrangement and want of facilities upon one of the roads not of a sudden development, or of a temporary duration, but one that had existed for some time prior to their making the contract.

Where there is a special contract to carry within a *prescribed* time, the carrier is held to a rigid performance of it, and is not excused even by inevitable necessity unless he has provided against it by positive stipulation.

APPEAL by defendants from a judgment of the Marine Court general term. The action was brought to recover damages for

non-delivery of fifty boxes of fruit entrusted to the defendants at the city of New York, to be transported to Milwaukee. Fifty boxes were delivered to the defendants for transportation on the 9th of April, 1856, and the other hundred boxes were delivered to them on the 26th of April, 1856. By the receipts, given by the defendants at the time, they contracted to transport the fruit and deliver it *at the depot of the railroad in Milwaukee* within twelve days from the date of the receipts respectively, Sundays, accidents, and casualties beyond their control excepted; or pay five cents per 100 lbs. per day for each day the goods were delayed beyond contract time; all claims for damages to be presented at the New York office for settlement. The receipts further provided that the defendants would not be liable for injury to any articles of freight during the course of transportation occasioned by the weather, or accidental delays, or natural tendency to decay; nor would their guaranty of special dispatch cover cases of unavoidable or extraordinary casualty; nor would they hold themselves liable, as forwarders, for such articles after their arrival at the place of their destination; and that certain articles specified, including fruit, would only be taken at the owner's risk of fracture or injury during the course of transportation, loading, and unloading, unless specially agreed to the contrary.

The goods were not delivered within the prescribed time. Six boxes of the first fifty were never delivered. The remaining forty four boxes were not received by the consignee until the 8th and 9th of May—twenty-nine days from their receipt by the company. The fruit was then decayed, and nearly ruined. The second lot arrived on the 17th and 21st of May, from twenty-one to twenty-five days after their receipt, and was also badly spoiled. The facts constituting the cause of the detention are fully stated in the opinion of the court. Judgment was rendered for the plaintiff for $475.00 damages, being the loss in the value of the fruit, and the five cents per day per 100 pounds named in the contract. This judgment was affirmed at the general term of the Marine Court, and the defendants appealed.

Luther R. Marsh, for the appellants.

I. The rights of the parties are to be adjudged *according to the written contracts.* The defendants had a right to enter into them, and to define or restrict their liability.

Common carriers, even, may do this. *The Mer. Mut. Ins. Co.* v. *Chase*, 1 E. D. Smith's Rep. 115; *Davidson* v. *Graham—Ohio case*, Am. Law Reg., vol. 3, No. 5, p. 291; *Dorr* v. *N. J. S. Navigation Co.*, 1 Kernan R. 485. But expressmen or forwarders, like these defendants, are not within such restrictions as yet exist against common carriers. 12 J. R. 232; *Hersfield* v. *Adams*, 19 Barb. R. 577. It was admitted, in this case, that the defendants do not own, and are not interested in, the lines or routes by which the freight they carry is transported, nor in the vehicles by which the same is carried.

II. The defendants, according to their contract, are not liable at all to the plaintiff. 1. The contract is "*to deliver at the depot of the RR. in Milwaukee.*" No breach of this contract is shown. The plaintiff has not shown that the goods did not all arrive *at the depot* within the contract time. The consignee is the only one who testified on this subject, and he only speaks of the time he received the fruit, or of the time it *arrived at his store or possession.* He does not show that he called for it at the depot—the place of delivery—at the expiration of the contract time, or at any time after, till the time he received it. "There must be some evidence" (even against a common carrier) "of the non-delivery according to the requirements of the bill of lading." 1 Car. & P. 110; 11 E Com. Law. R. 333; 5 Adol. & Ell. 543; 2 Greenleaf's Ev., p. 213; Angell on Carriers, 470. 2. The defendants are not liable for any injury *by decay of the fruit.* The contract expressly makes the conditions and the rules appended to it a part thereof. The 3d rule and condition is, that the company will not hold itself liable *at all* for injury to any article of freight, during the course of transportation, occasioned by *natural tendency to decay.* And the 4th rule and condition is, that "*fruit,*" among certain other enumerated articles, "will only be taken at the owner's risk of injury during the course of transportation, loading and

unloading, unless specially agreed to the contrary." Either of these conditions exempts the defendants from all liability for the *decay*. 3. The only liability there can be of the defendants is for the *delay*, if any, over the contract time, at the stipulated price of five cents per 100 pounds per day. As to this, we say: *a*. No delay is proved, as we have shown under the first subdivision of this point. It does not appear but that they arrived at the point of destination, the depot, in due time. *b*. If there was any delay, it was occasioned by causes not within the defendants' control, and comes within the meaning of the 3d condition and rule. By that the defendants stipulate that they shall not be liable "at all for any injury to any articles of freight, during the course of transportation, occasioned *by accidental delay*." 4. It is stipulated that "all claims for damages shall be made at the New York office only." This is, by the contract, a condition precedent to any liability of the defendants. Such is the agreement. There is no proof whatever that any such claim was made at the New York office. No proof but what it would have been paid if it had been presented there. The defendants had a right to protect themselves against ruinous litigation by the stipulation that if the party had any claims for damage, he should first present the same to them, at headquarters, so that they could investigate, and, if liable, pay without the expenses of suit. This is twice stipulated for, showing unusual stress upon it.

Stillwell & Swain, for the respondents.

I. The defendants are common carriers, and, as such, are liable for the damage in question, notwithstanding the restrictions printed on the back of the bills of lading. 1. They describe themselves as the Union Express Company, between New York and Milwaukee, and contract to transport merchandise between these two points at fixed rates of freight. This constitutes them common carriers, whether they are interested in the vehicles in which the goods are transported or not. *Wilcox* v. *Parmlee*, 3 Sand. R. 610; *Fairchild* v. *Slocumb*, 19 Wend. 329. 2. As common carriers, they could not limit their common law liability, except by

special contract. Before a shipper can be bound by any notice printed on the bill of lading, it must appear that his attention was called to the restriction, and that he assented to it. *Dorr* v. *N. J. S. Nav. Co.*, 1 Kernan, 486, and cases cited. 3. A party who delivers perishable goods to a carrier, and stipulates for their delivery within a given time, is not *to be presumed* to have assented to a condition that the carrier should not be liable for neglect to deliver the goods until they were lost by decay.

II. Whether the defendants are common carriers or forwarders, they are liable for a breach of their special contract to deliver these goods at Milwaukee in twelve days. 1. The plaintiff proved by the consignee that he did not receive the goods until thirty days after they left New York. The agent does not pretend that they arrived sooner, but accounts for the delay. If the goods arrived sooner, the defendants should have notified the consignee thereof. Goods must either be delivered to the consignee personally, or he must be notified of their arrival.[1] *Fisk* v. *Newton*, 1 Denio, 45; *Gibson* v. *Culver*, 17 Wend. 305; *Price* v. *Powell*, 3 Comst. 322. 2. The delay was clearly negligent. 3. Even an express assent by the shipper to the restrictions endorsed on the bills of lading, would not relieve the defendants from liability for their tortious or grossly negligent acts. 4. The conditions *printed* on the back of the bills of lading, by which the defendants restrict their liability for decay during the course of transportation, must be considered as qualified by the *written* contract to deliver them in twelve days.

III. The defendants are liable for all the damages occasioned by the delay, and are not restricted to the five cents for each 100 pounds per day. The stipulation to pay five cents for each 100 pounds per day, for delay beyond the stipulated time, was intend ed as compensation for the delay in the delivery of the goods only, and not for any damage to the goods themselves occasioned thereby, and the plaintiff is entitled to recover this, in addition to his other damage.

[1] See *Rowland* v. *Miln*, *post*.

IV. The bringing of the suit against the defendants at New York, is a sufficient presentment at the New York office of the claim for damage. If the defendants were ready, before suit brought, to pay the claim upon presentation at the New York office, they should have pleaded that fact, and followed it up by a tender in court.

By the Court, DALY, First Judge.—The defendants claim to be exempt from liability upon the ground that, as expressmen, they are merely forwarders, and not common carriers; and we are referred to the case of *Hersfield* v. *Adams* (19 Barb. 577), as authority for the proposition that express companies, who agree to transport goods or packages from place to place, for hire, in the ordinary and approved means of conveyance, who are not owners of, nor interested in, the vessels, boats, or other conveyances by which the goods are transported, are not common carriers, but mere forwarders, subject to no greater liability than ordinary bailees for hire. The case is a special term decision, ion given by the late Justice Morris, and this point was not essential to its determination, as the defendants had limited their liability by a written contract, which they might do as common carriers. *Dorr* v. *N. J. S. Nav. Co.*, 1 Kernan, 485. No authority was cited for the opinion expressed, which proceeded, in my judgment, from the want of a due consideration of what is sufficient in law to constitute a common carrier. It is a calling very distinct from that of a forwarder. A forwarder is one who, for a compensation, takes charge of goods entrusted or directed to him, and forwards them, that is, puts them on their way to their place of destination by the ordinary and usual means of conveyance, or according to the instruction he receives. *Platt* v. *Hibbard*, 7 Cow. 499; *Ackley* v. *Kellogg*, 8 Cow. 223; *Brown* v. *Denison*, 2 Wend. 593. Where he has a warehouse for the reception and safe keeping of the goods until they can be forwarded, he unites the two-fold occupation of warehouseman and forwarder, which is the usual mode of conducting the business in this country. His compensation is limited to his care and

trouble, and the charges paid by him, in receiving, keeping and duly forwarding; and, when he has placed the goods in the course of transit by the proper conveyance, his duty is at an end. His occupation is further distinguished from that of the carrier by the circumstance that he has no interest in, and receives no part of, the compensation that is paid for the carriage and due delivery of the goods. A common carrier is one who, for a reward, undertakes to carry goods for persons generally as a public employment, or, in the language of Mr. Justice Story, "one who holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation *pro hac vice*." Story on Bailment, § 495. An express company, therefore, who hold out to the public that they will take goods or parcels to be delivered at certain points or places, and who receive, or are to receive, the compensation that is paid for the carriage and delivery, are common carriers, and it is wholly immaterial whether they own or are interested, or not, in the conveyances by which the goods are transported, as it is the receipt, or the right to, the freight or charge for the carriage, together with the public nature of their employment, that makes them common carriers. The defendants in this case acknowledge, in writing, that they had received certain packages, which, by the writing, they agreed "to deliver at the depot at Milwaukee on the payment of freight according to the conditions of the company's tariff, classification and rules," which were endorsed upon the receipt, and made a part of it. This was engaging, as common carriers, to deliver the goods at the depot at Milwaukee, and subjected them to all the obligations incident to that employment, except so far as they had limited their liability by express stipulation.

By their contract they agreed to deliver each package receipted for, in twelve days after the date of the receipt, stipulating against accidents and casualties beyond their control, and particularly that their "guaranty of special despatch" should not "cover cases of unavoidable or extraordinary casualty." They also provided that "fruit" (which the packages contained) should be "at

the owner's risk of fracture or injury during the course of transportation, loading, and unloading." That they would not be liable for injury to any articles of freight during the course of transportation, occasioned by the weather, or accidental delays, or natural tendency to decay. That they would pay five cents per 100 pounds per day for each day the goods were delayed beyond contract time, if not delivered as per agreement; and that all claims for damages, overcharges, or any other cause, should be made, and presented for settlement at their office in New York. These stipulations and limitations of liability they had a right to make, and the rights of the parties are to be adjusted in accordance with them.

The witness Douglass swears that the 100 boxes of oranges receipted for by the defendants on the 26th of April, 1856, *arrived* on the 17th and 21st of May, 1856. Of the lot of fifty boxes receipted for by the defendants on the 9th of April, 1856, forty-four boxes were received by the consignees on the 8th and 9th of May, 1856. The six remaining boxes have not been accounted for.

The precise time of the arrival of the 100 boxes has been proved; but, in respect to the forty-four boxes, it is urged that proof of the time of their receipt by the consignees is not proof of the time of their arrival; and that, for all that has been shown upon the part of the plaintiff, they may have arrived within the contract time. As this action is for damages occasioned by the neglect or failure of the defendants to transport and deliver the property within the prescribed time, it is of course incumbent upon the plaintiff to show a breach of the contract. The goods were to be delivered at the depot at Milwaukee, and, as a general rule, where freight is to be delivered at a wharf, depot, or designated place, and the consignee is not there to receive it, it is the duty of the carrier to notify the consignee of its arrival. *Gibson* v. *Culver*, 17 Wend. 305; *Fisk* v. *Newton*, 1 Denio, 45; *Price* v. *Powell*, 3 Comst. 322; Angell on Carriers, §§ 315, 316. In this case, the consignees at Milwaukee were denoted upon the bill of lading simply by initials. This may give rise to some doubt as

to whether the direction was sufficient to impose this duty on the defendants, which I shall not stop to consider, as the objection raised may be otherwise disposed of.

The exact time of the arrival of the forty-four boxes being a matter peculiarly within the knowledge of the defendants, very slight evidence on the part of the plaintiff, in respect to the time of their arrival, was sufficient to throw the onus upon the defendants of showing when they arrived. One of the consignees having testified that he received them on the 8th and 9th of May, I think the justice was warranted in concluding that they had arrived about that time. This witness' testimony was taken *de bene esse*, and reduced to writing. In one part of it, he uses the word "received" on the 17th and 21st of May, as applied to the 100 boxes, and, when asked again when they were *received*, he answers they *arrived* on the 17th and 21st of May. This was evidence, in respect to that lot, that he received them on the respective days of their arrival. It was therefore some evidence to warrant the inference that the same thing took place in respect to the other lot—that is, that they arrived on the 8th and 9th of May, the days when the witness received them; or, if not, the testimony of the witness is susceptible of this interpretation, from the manner in which he uses the word, that he meant, by "*received*," "*arrived*." In either way, it was sufficient, in my judgment, to require at the hands of the defendants proof if the fact was otherwise, as they had knowledge, through their agents, of the exact time of the arrival; and as the witness was examined *de bene esse* more than twenty days before the trial, the cannot claim to have been taken by surprise. Proof by the co signee, also, that he received but forty-four boxes, was, for t same reason, sufficient *prima facie* that the remaining six bo had not been delivered; sufficient at least to require from defendants proof that they had been delivered, if such was fact. For the six boxes, then, the defendants were liable.

Regarding the evidence of the time of the arrival of the o boxes as sufficient, it was incumbent upon the defendant account satisfactorily for their delay in not delivering them w

the contract time; for, if the goods were deteriorated or injured in consequence of that delay, the plaintiff was entitled to be compensated for the damage sustained. It is urged that, as the boxes contained fruit, which, by the agreement, was to be "at the owner's risk of fracture or injury" during the course of transportation, or of loading, or unloading; and, as the defendants were not to be liable for the natural tendency of any article to decay, they were not responsible for the rotten and damaged condition in which the oranges and lemons were when they were delivered at Milwaukee. This must be understood, however, as applying to decay or injury to which the fruit might be subject during the prescribed time within which the defendants undertook to deliver it at Milwaukee. It was a perishable article, and it would be absurd to say that, if it perished by reason of the defendants' neglect to perform their contract, they would not, in consequence of this stipulation, be answerable for the loss. It was in evidence that the oranges and lemons were in good order at the time of shipment, and that, with the weather that prevailed in the months of April and May, 1856, oranges would keep for 25 days, and that then they would decay very rapidly. If kept or delayed, then, upon their carriage, much over that time, their decay and total loss was inevitable; and it would be doing the greatest violence to language to suppose that, under an agreement to transport them in twelve days, the parties meant, by "injuries in the course of transportation," or "natural tendency to decay," injuries or decay after that time, arising from the defendants' neglect to transport and deliver them. In other words, that the defendants might, with impunity, neglect to perform their contract until, from the perishable nature of the property, it became entirely worthless. It is not to be supposed that any public carrier would deliberately put forth such a reservation in favor of his own negligence; or, if he did, that any owner of property would agree that it might be transported upon such terms. Even if no time had been agreed upon, the defendants would have been bound to have completed their contract within a reasonable time, and, if they had failed to do it within that time without legal

excuse, and the property afterwards, and before delivery, had become injured from its natural tendency to decay, they would have had to make good the loss. The transportation contemplated by such agreements, is a transportation within the time prescribed, or within a reasonable time, during which period, including the period of loading and unloading, the enumerated articles are at the owner's risk of fracture or injury; and, as respects all other property, the defendants, within that period, are not liable for injuries occasioned by the weather, natural tendency to decay, or accidental delays.

It is further urged that the agreement of the defendants to pay five cents per 100 pounds per day for each day the goods might be delayed beyond contract time, is the extent of their liability for any damage or injury to the property. But this is an agreement to pay a certain sum for each day's delay in the delivery, and is recoverable where the defendants deliver the goods after the contract time, though in as perfect a state as they received them. It is not an agreement to pay for loss or damage, but is recoverable whether loss or damage is sustained or not. The owner may actually sustain no loss. The goods may have largely increased in value at the time of their actual delivery, and yet this sum, which the defendants contracted to pay in a certain contingency founded upon the consideration of the payment to them of the stipulated freight, would be due and payable. Suppose the goods to have been lost through the defendants' negligence, in that they were unable to make any delivery at all; is this per diem allowance to be a perpetual charge upon the defendants? What construction would be given to this provision in such a case. Would it be regarded as the mode or rate at which the plaintiff was to be compensated for his loss and damage? Clearly not; but as applicable only to cases where the property was delivered uninjured, but after the contract time. This, in my judgment, would be the fair and legal interpretation of it.

The plaintiff having shown that there was a delay of nine days in delivering the forty-four boxes of the first lot; that the re-

naining six boxes of that lot had not been delivered; that there was a delay of sixteen days in the delivery of the second lot; hat some of the boxes were broken, and the fruit had run out; ogether with the market value of the goods at Milwaukee at the ime when they were to be delivered, and the extent to which hey had depreciated in value from rot or decay when they were lelivered; had, in my judgment, established a case which entiled him to recover. The evidence was sufficient to warrant the ustice in concluding that the decay and injury of the fruit was he result of the delay in its delivery. It is insisted that as, by he agreement, all claims for damages were to be presented at he New York office for settlement, it was incumbent upon the plaintiff, as a condition precedent to the defendants' liability, to how that he presented his claim for settlement at that office, and hat, without proof of that fact, he could not maintain this suit. This reservation, however, is no stronger than that contained in a promissory note which the maker promises to pay upon demand; in respect to which it has been held that the commencement of the suit is a sufficient demand; or which the maker promises to pay on a particular day at a particular place, in which it s not necessary to aver or prove, to charge him, that a demand was made at the time and place. His readiness to pay at the ime and place, or at the commencement of the suit, is matter of lefence which goes only to the question of interest and costs, and ot to the cause of action, of which he must avail himself by pleading the fact specially, and bringing the money into court. *Haxtun* v. *Bishop*, 3 Wend. 21; *Walcot* v. *Van Santvord*, 17 John. 248; *Green* v. *Goings*, 7 Barb. 652. The defendant's answer here was a general denial, and it does not appear that he made any tender in the court below of the amount which the plaintiff recovered, or admitted that he was liable at all for any amount.

The remaining question in this case, is whether the evidence offered by the defendants established, in the language of their agreement, that the delay was accidental, or the result of unavoidable or extraordinary casualty. They proved that they sent the goods by the N. Y. Central Railroad, the Suspension Bridge,

and the Great Western Railroad, through Canada, and that they had no arrangement with any other road. That in March, April and May, 1856, the Great Western road was not able to take freight as fast as the New York Central could deliver it. That the Great Western road was building a new freight-house on the Canada side, and that there was some disarrangement of the road. That that road was at least ten days behind, upon an average. That in those months there was a great accumulation of freight at the bridge. Some freight lay there ten or fifteen days. That the cause was a snow storm, the building of the freight-house on the Canada side, and the disarrangement of the Great Western road. That they could have sent the freight by another route, the New York and Erie Railroad, but they had no arrangements with that route. Even if this evidence was sufficiently specific and certain to show that the delay in the delivery of these particular goods, proceeded from the causes above stated, it did not show that it was the result of accidents or casualties beyond the defendants' control. Engaged, as the defendants were, in the transportation of goods as a business, it was their duty to know the condition and possibilities of transport afforded by the routes which they selected before entering into an express contract to transport goods within a stipulated number of days, especially as the causes which they now set up as their excuse, were not of sudden development or temporary duration, but extended over a period of three months. The chief causes, the disarrangement and want of facilities on the Great Western road, they knew, or should have known. One of the members of their company was at the Suspension Bridge in March, to attend to the getting of the freight through for the company. In the latter part of March there was a large accumulation of freight at the bridge, and while he was there, there was a snow storm that stopped the cars on the Central side. He was there again between the 18th and 23d of April, some days before the last of the two lots were shipped, and the Great Western Railroad Company having built a new depot for the transfer of freight, they had not got their tracks laid, and, instead of sending on 100 cars a day, as they anticipated, they

could only send 30 or 40. All this, it would seem, was known to the defendants, or to the member of their company whose business it was to attend to getting the freight through, and who, by his own statement, knew the capacity of the roads which the defendants made use of for carrying freight in April and May. The route being thus obstructed, the defendants ought not to have made such contracts, or, making them, they should have sent the goods by another route. Their witness testified that the fruit could have been sent by the New York and Erie Railroad. It is suggested that that road may have been obstructed also. If it was, it was for them to show it; for them to make out that the delay was unavoidable—the result of causes beyond their control. With a knowledge on the part of a member of their company that the route was obstructed in March, that there was a large accumulation of freight at the Suspension Bridge in the latter part of March, they saw fit, on the 9th of April, to enter into a contract to deliver at Milwaukee in twelve days, which, with culpable ignorance or actual knowledge, they undertook to execute by sending the goods by a route, the condition of which, according to the showing of their defence, was such that they could not be transported within that time. They either contracted to do what they knew to be impossible, or, being possible, neglected to avail themselves of a route by which, according to their own witness, the goods might have been sent. If there was any difficulty or obstruction upon that route, it was for them to prove it. They did the same thing again, and under the same state of things, on the 26th of April, and all that need be said is that they must answer for the consequences.

Where there is an express contract to carry within a *prescribed* time, the carrier is held to a rigid performance of it, and is not excused even by inevitable necessity, unless he has provided against it by express stipulation. Angell on Carriers, § 294. On such a contract, no cause of delay can be pleaded except it has been distinctly reserved and named in the contract. The causes provided against in the contract are accidents or casualties beyond the defendants' control; or, as it is expressed in another

part of the writing, cases of unavoidable or extraordinary casualty. They did not establish that the delay was beyond their control, or the result of unavoidable casualty. For all that appeared, it was, or may have been, in their power to have transported the goods within the twelve days.

Judgment affirmed.

PHILOLOGOS HOLLEY *v.* HENRY D. TOWNSEND.

T., the owner of certain real estate, agreed with Ho., a broker, to pay him a commission if he would procure a purchaser for the property by a specified day. On that day, Ho. informed T. that he was unable to procure a purchaser. He afterwards informed Hi., another broker, that the lots were for sale. Hi. procured a purchaser, but T. refused to pay him any commissions, and Hi. received his compensation from the purchaser.

Held, that Ho. was not entitled to recover commissions from T.—BRADY, J., *dissenting*.

I. The employment of Ho. by T. was at an end at the time when he informed T. that he was not able to procure a purchaser.

II. Nor did he, in fact, procure the purchaser. He merely informed another broker that the defendant had the lots for sale, and that broker procured the purchaser.

A party is not entitled to recover a commission from the owner of real property for informing a broker that such property is for sale, although a purchaser is afterwards procured by such broker.

APPEAL by defendant from a judgment of the Fourth District Court. The action was brought to recover for broker's commissions. Judgment was rendered for the plaintiff. The facts in the case are fully stated in the opinions of the court.

William R. Martin, for the appellant.

L. J. Goodale, for the respondent.

HILTON, J.—In the fall of 1857, the defendant owned six lots on Forty-seventh street, in this city. The plaintiff's son, Byron M. Holley, called to inquire their price, and to learn what commissions the defendant would give upon a sale.

The testimony is conflicting as to whether or not B. M. Holley stated to the defendant that he came on behalf of the plaintiff, but it is quite evident, from the letter of the defendant to B. M. Holley in evidence, that *he*, and not the plaintiff, was the person with whom the defendant supposed he was dealing. This negotiation was finally ended by B. M. Holley calling upon and informing defendant of the inability of Holley, or the party for whom he had acted, to purchase the lots. The defendant was then justified in supposing that, as the negotiation entered upon by Holley had ceased, all obligations connected with or incident to it were at an end.

Some time after, a Mr. Higgins, another broker, called on the defendant respecting these lots, having been informed of his ownership by Holley, (whether plaintiff, or his son, is not specified.) Higgins says that he distinctly told defendant, when he called, that he came from Holley; and the defendant states directly the contrary. But whether Higgins so stated or not, is quite immaterial, because he and the defendant agree as to what subsequently took place respecting the sale and commissions. Upon Higgins opening the conversation with the defendant respecting the lots, the defendant inquired whether commissions were to be charged him; being answered in the affirmative, he at once declined to sell on the terms proposed. Higgins then left; and, as appears from the testimony of the witness Day, having in the meantime secured his commissions from the purchaser, called the day after on the defendant, and agreed to take the lots and charge no commissions. This agreement was distinctly reiterated at the time the defendant executed and delivered to Higgins the final contract of sale, and in the presence of the subscribing witness Long.

Under these circumstances, it seems difficult to understand upon what principle the defendant can be held liable to the plain-

tiff for commissions on the sale. Long before its negotiation commenced, any contract which existed between the plaintiff and defendant respecting the lots was put an end to, by the mutual understanding of the parties to it; and throughout the interview which terminated in the sale finally made, it was distinctly and expressly agreed, between the defendant and Higgins, that no commissions were to be expected or paid.

The judgment should therefore be reversed.

DALY, First Judge.—I agree with Judge HILTON. B. M. Holley testified that Townsend told him that the lots were for sale, and that he would pay a commission of one per cent. Townsend testified that he gave B. M. Holley until Friday to see what he could do, upon which day he called and said he could do nothing with the lots. Upon this point there is no conflict, and it is, I think, decisive of the case. Even if B. M. Holley told Townsend that he came from the plaintiff, this must be construed as an agreement to pay a commission provided a purchaser was procured by the day fixed. On that day, B. M. Holley called and told Townsend he could do nothing, and the employment was at an end. A sale was afterwards effected through Higgins, who obtained his commission from the purchaser, Townsend having refused to pay him a commission. The plaintiff did not procure the purchaser. He merely informed another broker that the defendant had the lots for sale, and that broker procured the purchaser, and sought to get the defendant to pay him a commission for effecting the sale, which the defendant declined. There was no employment existing when the plaintiff informed Higgins that the lots were for sale, and a man is not entitled to a commission from the owner for informing a broker that certain lots are in the market, a purchaser for which is afterwards procured by the broker. A right to a commission must be founded upon a contract express or implied, and none existed between the defendant and the plaintiff when Higgins procured the purchaser.

The judgment should be reversed.

BRADY, J., dissenting.—It does not appear, from the defendant's statement, that the plaintiff was negotiating a sale of the lots in question for himself, or that Byron M. Holley was acting on his own behalf, with the intent of purchasing for himself. All that the defendant says, having any reference to that subject, is that he never saw the plaintiff until he saw him in court at the time of the trial; and that Byron M. Holley never said, or insinuated, that he was acting for plaintiff. He does state, however, that he gave B. M. Holley "until a Friday to report *whether he could do anything*, He called the day fixed, and said *he could do nothing with the lots.*" Holley swears that he called on the defendant, at the request of the plaintiff, in reference to the lots in question, telling defendant at the time that the plaintiff sent him. That the defendant then said he was the owner of the lots, and that they were for sale. That defendant named the price, and said he would pay a commission of one per cent. Higgins swears that plaintiff informed him of the lots, and that he went to the defendant thereupon. The evidence on the part of the plaintiff proves an employment, a sum agreed upon as a compensation, and that the defendant was benefitted by the plaintiff's services rendered. The defendant's statement corroborates the evidence of B. M. Holley. If the plaintiff or B. M. Holley designed to purchase, and applied for that purpose, the defendant should have so stated. His silence, and the peculiar phraseology used by him in giving his testimony, justify the conclusion that such was not the case. The evidence of Jones, and of Higgins, in reference to a commission, affecting only the right of Higgins to charge one, does not conflict with the view presented of the agreement between the parties. But even were it otherwise, there is abundant testimony to sustain the finding, and in my opinion it cannot be said that the finding is clearly against the weight of evidence.

I think the judgment should be affirmed.

Judgment reversed.

ANDREW MORRIS *v.* ANSON G. PHELPS AND OTHERS.

Where a party has been injured by a collision upon a public highway, he cannot maintain an action if the facts show that he has in any manner, by his own carelessness or neglect, contributed to or caused the injury of which he complains.

M. left his horse and cart standing upon a public pier or dock, within two feet of the edge, at a time when the pier was crowded, and there was room for only one horse and cart to pass upon it. The horse's bit was out, and he was feeding. The defendants' cart, passing, came in contact with M.'s cart, and threw it and the horse into the river, where the horse was drowned.

Held, that M. could not recover therefor. He was not only obstructing a public highway, but was guilty of gross negligence in leaving his horse at the edge of a dock, after removing the bit, the only thing by which the animal could, in case of accident or emergency, be controlled.

APPEAL by defendants from a judgment of the Marine Court at general term. This action was brought to recover damages for the death of the plaintiff's horse. The facts in the case are fully stated in the opinion of the court.

Abram Wakeman, for the appellants.

Francis Byrne, for the respondent.

By the Court, HILTON, J.—To entitle the plaintiff to recover in this action, it was necessary for him to establish the proposition, that the killing of his horse was caused by the wrongful acts of the defendants, or of their servant while in their employment; and that he did not in any way, by fault or negligence on his part, cause or contribute to the injury of which he complains. *Butterfield* v. *Forrester*, 11 East, 61; *Bush* v. *Brainard*, 1 Cowen, 78; *Harlow* v. *Humiston*, 6 Cowen, 191; *Brownell* v. *Flagler*, 5 Hill, 282; *Brown* v. *Maxwell*, 6 Hill, 592; *Spencer* v. *Utica and Schenectady RR.*, 5 Barb. 337; *Brand* v. *Schenectady and Troy RR.*, 8 Barb. 368, 382.

It appears, from the evidence on the trial, that on November

17th, 1857, the plaintiff's horse, attached to a coal cart, was standing on the upper side of the pier or dock at the foot of Beekman-street in this city, with the bit out of his mouth, feeding out of a bag placed on top of a cask. The cart was along side of the string piece of the pier, and the horse was within two feet of its edge. This was between one and two o'clock in the day, when the dock was crowded with vehicles, and there was not room for more than one horse and cart to pass on the dock alongside of where the plaintiff's horse was standing. A horse and cart of the defendants', in passing through this space loaded with sheet iron for the bonded warehouse, came in contact with the plaintiff's cart, threw his horse over the side of the pier, and, after hanging a short time upon a hawser, the animal fell into the water and was drowned.

These are the undisputed facts, and upon them it is impossible to say that the plaintiff was free from negligence. He was not only obstructing a public highway at an hour of the day when it was so crowded as to permit but one vehicle at a time to pass through it, but he was guilty of gross negligence in standing his horse at the edge of a pier after removing the bit, the only thing by which the animal could, in case of accident or emergency, be in any way controlled.

It is a rule of law too well settled to admit of any doubt, that where a party has been injured by a collision upon a public highway, he cannot maintain an action if the facts show, as in this case, that he has drawn the mischief on himself by his own carelessness and neglect. *Hartfield* v. *Roper*, 21 Wend. 615; *Rathbun* v. *Payne*, 19 Wend. 399; *Burcle* v. *N. Y. Dry Dock Co.*, 2 Hall's Super. Ct. R. 151; *Lane* v. *Crombie*, 12 Pick. 177; *Smith* v. *Smith*, 2 Pick. 621.

It was the duty of the judge on the trial in the court below, upon these facts, to have dismissed the complaint; and the judgment in favor of the plaintiff should therefore be reversed.

Judgment reversed.

LUCIEN ETCHBERRY *v.* JOSEPH LEVIELLE.

The intentional doing of a wrongful act with knowledge of its character, and without cause or excuse, is malicious.

Malice is of two kinds: malice in law—which is inferred from an act unlawful in itself, and injurious to another; and express or actual malice—which relates to an actual state or condition of mind to be established as matter of fact by the circumstances of each case.

It is not necessary, to constitute express malice, that the act should proceed from hatred or ill-will. It may be inferred from an apparent mischievous intention of the mind, or from inexcusable recklessness.

E. and L., being engaged in a game of shooting at a target by blowing a sharp arrow of steel through a tube, L. blew through the tube at E., and, notwithstanding the repeated remonstrances of E. and others, continued to do so until at last the arrow struck E. in the eye, severely wounding him so as to confine him to his bed for nearly four months and a half, and to cause the total loss of the eye.

Held, under the circumstances, sufficient to warrant an inference of actual malice, and to justify a verdict for vindictive damages.

The judge at the trial charged the jury that if the injury was purely the result of an accident, the defendant was liable only for actual damages; but, if the defendant acted with the intention of annoying, harrassing, or teasing the plaintiff, then the rule would be different; and in the latter case, even if the injury was unintentional, the jury might give more than the actual damages—they might give "smart money." *Held*, correct.

In actions for injuries to the person or character, it is not possible, in the nature of things, to ascertain or measure the extent of the injury by any absolute pecuniary standard. In such cases, the damages cannot be fixed and established in money by the evidence. The law cannot repair what has been done, or replace the party in so good a position as he was. All that it can do is to compel the party who did the injury to make a pecuniary satisfaction; and, in ascertaining what it shall be, all the circumstances under which the injury occurred, are to be considered.

In an action to recover damages for an injury to the person of the plaintiff, by the unlawful and malicious act of the defendant, it is neither a defence nor matter in mitigation that the plaintiff was engaged in an unlawful game upon the Sabbath at the time of the injury.

APPEAL by defendant from an order at special term denying a motion for a new trial. This was an action to recover damages for an injury to the person. The facts out of which the action arose, are very fully stated in the opinion of the court.

Waldo Hutchins, for the appellant.

I. The judge erred in refusing to charge, as requested by defendant's counsel, "that as the plaintiff was, at the time he sustained the injury complained of, present in a public or tippling house, engaged in playing a game which was in violation of law, he cannot recover damages for the injury complained of." Also, in refusing to charge "that, under the circumstances of the case, the plaintiff was guilty of negligence; and, therefore, cannot recover damages for the injury." And furthermore, in refusing to charge "that the fact that the plaintiff was at the time engaged in an amusement in an unlawful manner, might be taken into consideration in mitigation of damages." 2 R. S. (4th ed.) 83, § 66; *Bosworth* v. *Inhabitants of Swansey*, 10 Met. 363; *Stickle* v. *Richmond*, 1 Hill, 77; Sedg. Meas. of Damages, 468, and cases cited. II. The judge erred in charging the jury that if the act of the defendant was malicious, then the jury might give smart money, There was certainly no evidence in the case of express malice, or from which malice could be inferred, and it was there fore error on the part of the judge to submit the question of ma lice to the jury. *Krom* v. *Schoonmaker*, 3 Barb. S. C. 647; Sedg. on Meas. of Damages, 454, 455; 3 Greenl. Ev. §§ 14, 15, 144 to 147. III. The judge erred in charging the jury, that if the act was done with the intention to annoy or tease the plaintiff, then also they might give smart money. IV. The damages found by the jury were, under the circumstances, excessive.

John Graham and *George Carpenter*, for the respondent.

I. It is absurd to say, because a man is acting unlawfully himself, or is in an unlawful position, that, *civilly* speaking, any wrong can be done to him, without any responsibility attaching to the person who does it. II. To ask the court to charge the jury that the plaintiff was guilty of negligence, was asking the court to take the whole case from the jury. Why did not the defendant move for a non-suit at once? III. So long as the plaintiff did not contribute to his injury, it is difficult to see what his actions or conduct had to do with the defendant's mischiev-

ously putting his eye out. How could they possibly qualify the *animus* of the defendant? IV. A malicious injury is always punishable with exemplary damages. There are different ways of showing malice. *Annoyance* is one of the most marked. The charge on this point is nothing but the assertion of a familiar principle.

By the Court, DALY, First Judge.—The defendant Levielle is the keeper of a liquor store in Thirty-third street. On a Sunday afternoon in November last, he invited the plaintiff Etchberry to come to his store and take a glass of wine. Etchberry accepted the invitation, and, while they were at the store, Levielle, and other parties who were there, commenced playing at a game. The game consisted in blowing a sharp piece of steel with feathers attached to it, through a tube, at a target. When Levielle blew the piece of steel at the target, Etchberry went up to count the game, whereupon Levielle blew through the tube at him, and the instrument or arrow struck him in the back collar of his coat. Levielle was then told, by a bystander, that he ought not to do it; that it was dangerous; that if Etchberry should turn his head it might hurt him. But, not heeding this warning, he blew the arrow at Etchberry again, and struck him in the back. Etchberry then went up to Levielle in a menacing manner, and raised his fist to strike him. Some hard words passed between them, Etchberry appearing to be in a passion. Levielle laughing, and in good nature, and not excited. A few minutes after, Etchbery being near the target, Levielle shot at him again; and, as Etchberry stepped back from the target and turned his head, Levielle pointed the tube at him, blew through it again, and the instrument struck Etchberry in the eye. The bystanders gathered around, Etchberry drew the instrument from his eye, and, as he did so, the blood started out, and he seemed to be suffering a great deal. He went home, was laid up for four months and a half, keeping his bed nearly the whole of that time, suffered a great deal of pain, especially in the head, the inflammation lasting three months and a half, and totally lost the use of his eye. He

was attended, during his sickness, by three physicians, whose bills amounted to over $800, and was put to other expense in the course of his sickness, amounting altogether to $112. He was a builder. He had to give up his business in consequence of the injury, and had not been able, up to the time of the trial—seven months after—to do any business. He was the father of six children, four of them dependent upon him for support. Upon this state of facts, the jury gave him $5000 damages.

The judge was requested to charge the jury that, as the plaintiff was present in a public tippling house engaged in playing the game out of which the injury arose, which was in violation of law, he could not recover damages for the injury; that under the circumstances he was himself guilty of negligence, and could not therefore recover; or, as he was engaged in an amusement in an unlawful manner, that that might be taken into consideration in mitigation of damages. Which instruction the judge refused to give. The judge, among other things, charged the jury that if the injury was the result purely of an accident, then the defendant was liable only for the actual damages; but that if the defendant acted with the intention of annoying, harrassing, or teasing the plaintiff after warning, then the rule would be different, even though the actual injury was unintentional. That if the act of the defendant was malicious, or such as he, the judge, had described—if it was done with the intention to annoy or tease the plaintiff; that then they might give more than actual damages—they might give smart money; but if not, then only the actual damages.

In this instruction, the judge distinguished between an injury proceeding from an act done with no mischievous or harmful intent, and an injury, though greater than was intended, the result of an act evincing a mischievous disposition to annoy, harrass, or tease. Holding, in effect, that in the one case the party whose act caused the injury would be responsible to the extent of the actual damage sustained, however harmless his intention; but, that in the other, the act would be malicious, and the jury might

go beyond the actual damages, and give smart money. This was a proper distinction. An act done with the intention of annoying, harrassing, or teasing, after due warning, is a malicious act, in the sense in which that word is understood in the law, and as it is applied in the question of damages. Malice has been comprehensively defined to be "the intentional doing of a wrongful act with knowledge of its character, and without just cause or excuse. *State* v. *York*, 9 Metc. 104; *Wiggins* v. *Coffin*, 3 Story, 7. We distinguish between malice in law—which is a mere inference or presumption of law—from an act, unlawful in itself, which is injurious to another, (*Duncan* v. *Thwaite*, 3 B. & C. 585;) and express or actual malice, which relates to the actual state or condition of mind of the person who did the act, and which is a question of fact upon the circumstances of each particular case. 2 Starkie's Ev. 674. To constitute express or actual malice, it is not necessary that the act should proceed from hatred or ill-will to the person injured; but it may be inferred from a mischievous intention of the mind, or from inexcusable recklessness. *Rex* v. *Harvey*, 2 B. & C. 268; 1 Russell on Crimes, 483, n. *i*; 6 Amer. Law Reg. 322. Such was the case here. The defendant may not have intended to put out the plaintiff's eye, or to do him any serious bodily harm; but he wantonly and recklessly persisted in shooting or blowing at him a sharp pointed instrument, impelled, according to the testimony, with great directness and force—an act highly dangerous, deliberately done, exhibiting a reckless disregard of the safety of others, and a wanton and malicious spirit of mischief. He repeated the act after he was urged to desist, and warned that it was dangerous; and when the plaintiff, provoked by the repetition of the assault, threatened to strike him, he persisted, did it again, and desisted only when the dart or arrow lodged in the plaintiff's eye. That this was acting maliciously in the sense in which the term is understood in the law, does not, in my judgment, admit of doubt. It evinced a deliberate intention to vex, injure, and annoy, regardless of consequences. The consequences were, probably, more serious than was intended; but the malicious act consisted in persistently

doing, against all warning and remonstrance, what involved the possibility of such a consequence. The object of punitory or exemplary damages is that they may operate as a punishment and restraint to the offender, and as a benefit and example to the community, (Sedgwick on Damages, 454; Mayne on Damages, 18); and certainly, conduct like this comes within the spirit and intent of this principle of the law of damages.

In actions for injuries to the person or character, it is not possible, in the nature of things, to ascertain or measure the extent of the injury by any absolute pecuniary standard. The value of an eye is not susceptible of exact and positive proof, like the value of a watch or a piece of furniture. In the one case a pecuniary compensation can be given, that may enable the injured party to replace what he has lost by a thing of equal value; but in the other the injury is irreparable. In such cases, therefore, it is idle to talk of the actual damage as a thing ascertainable or which can be fixed or established by evidence. The law cannot repair what has been done, or replace the party in as good a condition as he was. All that it can do is to compel the party who did the injury to make a pecuniary satisfaction; and, in ascertaining what it shall be, all the circumstances under which the injury occurred are to be taken into account, weighed, and considered. This necessarily includes the motive or intention with which the act was done. If the party who did the act contemplated or intended to injure, or if he knowingly, wantonly, and recklessly persisted in doing acts fraught with great danger or probability of injury, and which ultimately produced it, then, as a punishment, and to deter him from such conduct in future, and as a benefit and example to the community, he should be compelled to pay a greater sum as the pecuniary equivalent or satisfaction, than one who is liable, having caused an injury, but who had no design or intention to injure. This was substantially the distinction made by the judge upon the trial, divested of the language in which it was expressed. It was a just distinction, and one by which the jury had a right to be governed, under the circumstances of the case, in fixing the amount of damages.

The instruction requested was properly refused. There was nothing in the case to show that the plaintiff, by any negligence on his part, contributed to the injury. Even if he was engaged in an unlawful amusement or game upon Sunday, which is by no means clear upon the evidence, it furnished no legal excuse for the assault that was made upon his person, nor could it operate in mitigation of damages.

Order at special term, denying a new trial, affirmed.

ERNEST MULDENOR, Administrator of HERMANN E. LUDEWIG *v.* PATRICK MCDONOGH.

A motion to open a default, and set aside an inquest, is addressed to the discretion of the court, and no appeal lies from an order denying such motion.

APPEAL from an order at special term, denying a motion to open the defendant's default and set aside an inquest taken against him.

This suit was originally commenced in the name of Hermann Ludewig as plaintiff, and, under the title of *Ludewig* v. *McDonogh*, was on the calendar. After issue joined, Ludewig died, and the present plaintiff was substituted. The defendant put in a new answer, denying, among other things, the appointment of administrator; but the cause was not put upon the calendar under its new title. The cause being reached by its original title, an inquest was taken. The defendant's attorney moved to set aside the inquest on the ground of irregularity, but did not specify the irregularity complained of in his notice. The motion was denied, and the defendant appealed.

F. Cahill, for the appellant.

Martin & Smiths, for the respondent.

By the Court, BRADY, J.—The motion made at the special term ras one addressed to the discretion of the court, and from the rder made no appeal lies. *St. John* v. *West*, 4 How. Pr. Rep. 331; 'eeley v. *Chittenden*, 10 Barb. 303; *Tracy* v. *N. Y. Steam Faucet Co.*, E. D. Smith, 357; *Sherman* v. *Fell*, 2 Coms. 186. The order ight have been reviewed under the rule of this court, adopted larch, 1851, upon the certificate of the judge by whom the order ras made, that the question involved was one of importance nd doubt. *Mead* v. *Mead*, 2 E. D. Smith, 228. The certificate ot having been procured, the appeal must be dismissed.

Ordered accordingly.

WILLIAM B. TOWNSEND *v.* EDWARD C. FISHER.

. applied to S. for certain rooms and board. Negotiations were entered into between them, which finally resulted in F.'s taking the rooms and paying $10 to bind the bargain, S. giving a receipt therefor in these words: "Received from ——— ——— ten dollars, which amount secures him board for self and lady, and is to be applied on the first week's board; to be forfeited if not taken." Prior to giving this receipt, S. had made no agreement to reserve the rooms for F. *Held*,

That the receipt constituted a contract in writing, merging all prior parol negotiations, and was not liable to be varied by parol.

I. That any prior agreement, made by F., to take the rooms, was void for want of mutuality, under the familiar rule of law that an agreement consisting of mutual promises must be binding upon both parties to it, or it will bind neither.

II. That the sum of $10 was, by the receipt, agreed upon as in the nature of liquidated damages, and was the extent of F.'s liability upon his failure to take the rooms according to agreement.

APPEAL, by defendant, from a judgment of the Marine Court t general term. The action was brought by the plaintiff, as ssignee of Catherine Sturtevant, to recover $305.10 alleged to e due her for board. Mrs. Sturtevant kept a boarding house

on Staten Island. On July 3d, 1856, the defendant applied to her for board for himself and wife, and family—in all, six persons. He looked at the rooms, and said he wished one changed so as to bring the three rooms which he would occupy together. The negotiations were carried on between him, and the daughter of the assignor, Miss Mary E. Sturtevant. On the 5th of July following, Miss Sturtevant called at Mr. Fisher's store, and told him that the rooms were ready for his occupation, asked him if he had concluded to take them, and requested $10 for the purpose of securing the rooms, and to bind the bargain. He gave her $10, and she then gave the following receipt:

"NEW YORK, July 5th, 1856.

Received, from Mr. E. C. Fisher, ten dollars, which amount secures him board for self and lady, and is to be applied on the first week's board; to be forfeited if not taken.

"$10. MRS. C. STURTEVANT."

This receipt was put in evidence upon the trial, and marked Exhibit No. 2.

The defendant never occupied the rooms, and the plaintiff brought this action to recover for nine weeks' board, at the rate of $35 per week. Judgment was given for the plaintiff for $147.50, the amount of the room rent, deducting the board; which was affirmed at general term. The defendant appealed.

Clark & Cornwall, for the appellant.

I. Exhibit No. 2 is not only a receipt, but also a contract; and, when a receipt is in the nature of a contract, it is, so far, within the general rule that contracts in writing cannot be varied or explained by parol testimony. 1 Cow. & Hill's Notes on Ph. Ev., 216 and 217; 2 Id., 1439; *Smith* v. *Brown*, 3 Hawks' (N. C.) Rep. 580; *May* v. *Babcock*, 4 Ham. Ohio R. 334; *Querry* v. *White*, 1 Bibb's (Ky.) Rep. 371; *Raymond* v. *Roberts*, 2 Aik. (Vt.) Rep. 204; *Stone* v. *Vance*, 6 Ham. (O.) Rep. 246; *Benjamin* v. *Sinclair*,

1 Bail. (S. C.) Rep. 174; *Cherry* v. *Holly*, 14 Wend. 26; *Barber* v. *Brace*, 3 Conn. Rep. 9.

II. The object of the paper, Exhibit No. 2, and of the payment of the $10 by the defendant, was to settle the terms of the contract, to secure Mrs. Sturtevant against loss in case the board was not taken, and to fix and limit the liability of the defendant. The same view is supported by the other evidence. (*a*) The fact that Miss Sturtevant called on the defendant on the 5th July, shows that the arrangement was left unfinished on the 3d. (*b*) Also the fact that she wanted a payment of $10 to "bind the bargain," as she says. But Miss Sturtevant incidentally reveals her real object in asking for the payment: "I stated that parties had engaged these rooms before, and not taken them." (*c*) The same facts are more fully established by the evidence that "She asked Mr. Fisher if he had concluded to come down and take the rooms," and asked him "for an advance of money for the purpose of securing the rooms." (*d*) But, in any event, there was no valid agreement made until Exhibit No. 2 was given, as the amount was over $50, and a verbal arrangement would come within the statute of frauds.

III. The written contract was the consummation of all previous arrangements in relation to the board, and, for the mutual interest, and to the mutual satisfaction of the parties, fixed and liquidated the damages for failure to take the rooms; and all testimony in relation to previous conversations, or going to vary the terms of the contract, should have been stricken out.

IV. The plaintiff should have been non-suited because Exhibit No. 2 conclusively shows, not only that the damages for not taking the board were fixed and liquidated, but also that they were paid, and the plaintiff had no cause of action.

V. The verdict should have been for the defendant, because the only proof of any contract that the court could consider was Exhibit No. 2, which did not fix any liability upon the defendant, but, on the contrary, showed conclusively that he had paid the damages as fixed by the parties. A verdict for the plaintiff was error—being without proof to sustain it.

VI. There was no proof before the court that Mrs. Sturtevant sustained any damage by the neglect of the defendant to take the board. It may have been an advantage to her. The court cannot assume that she suffered damage. Much less can it fix the damage at a considerable amount without any proof whatever. There being no proof to sustain the damages as found, or at any sum, the verdict would be error, even if Exhibit No. 2 did not fix and liquidate the damages. The universal rule is, that "The plaintiff must show himself to have sustained damages," and "compensation will only be given for actual loss." Sedgwick on Damages, 200; Id. 210, 211; *Wilson* v. *Martin*, 1 Denio, 605; *Spencer* v. *Halsted*, 1 Denio, 606; *Shannon* v. *Comstock*, 21 Wend. 457; *Chamberlain* v. *M'Callister*, 6 Dana's (Ky.) Rep. 352; *Caldwell* v. *Reed*, Littell's (Ky.) Sel. Cas. 366.

H. D. Townsend, for the respondents.

I. The only defence interposed in this case, is a receipt marked Exhibit 2, which, defendant claims, so alters the original contract as to preclude a recovery on the part of the plaintiff. The same must be entirely disregarded, for the following reasons: *First.* The *contract* was made between Catherine Sturtevant and the *defendant*, at her house on Staten Island, July 3, 1856, and was complete. The receipt was signed July 5, when the witness, Mary Sturtevant, went to the store of defendant to notify him that the rooms were ready. *She had no right to make a new contract. Second.* The receipt is not signed by Mrs. Sturtevant—nor shown that she assented to it or ever knew it.

II. The contract was complete—fully complied with, as far as lay in plaintiff's power. The defendant having failed on his part, is liable to pay the full amount, and for the full term contracted. 1 Chitty's Gen. Pr. 81; *Gandell* v. *Pentrige*, 4 Carp. 375; *Payani* v. *Gardolf*, 2 Car. & P. 370; *Fanat* v. *Cash*, 5 Barn. & Adol. 904; *Reed* v. *Boyer*, 4 McCord, 247.

III. When one contracts to employ another for a certain period for a specified consideration, and discharges him without cause before the expiration of the time, he is bound to pay him

the full amount of wages for the whole time. *Costigan* v. *Mohawk RR. Co.*, 2 Denio, 609; Chitty on Cont. (5th Am. ed.) 575 to 581; 1 Chitty's Gen. Pr. 72 to 83; Brown on Actions on Cont. 180–5, 504–5.

By the Court, HILTON, J.—It is quite immaterial, for the purposes of this action, what took place at the interview on July 3d, as it is manifest that Mrs. Sturtevant did not consider herself obligated, by anything then said, to retain the rooms for the defendant. The object in calling on the defendant on July 5th, was, in the language of Miss Sturtevant, who appears throughout to have acted as the agent of her mother; "to bind the bargain." Before this was considered by her as accomplished, and the rooms secured to the defendant, he was required to pay $10. At this time the only agreement was entered into, by which Mrs. Sturtevant and the defendant considered themselves bound. Its terms are clearly expressed in the receipt, and are not liable to be varied by parol evidence. *Wolfe* v. *Myers*, 3 Sand. S. C. Rep. 7; *Niles* v. *Culver*, 8 Barb. S. C. Rep. 205, C. C. By it the defendant secured board for himself and lady with Mrs. Sturtevant, not for any specified time, and the $10 thus paid to bind the bargain was to apply on the first week's board; and, if the board was not taken, the amount paid was to be forfeited. The parties having thus agreed upon a sum in the nature of liquidated damages, that is the extent of the defendant's liability. Sedgwick on Meas. of Damages, 397.

Another reason might be assigned, if it were necessary, for disregarding the interviews between the parties prior to this written contract being entered into. It is the familiar rule of law, that an agreement, consisting of mutual promises, must be obligatory upon both parties to it, or it will bind neither. Chitty on Contracts, 15; *Livingston* v. *Rogers*, 1 Caines, 583; *Tucker* v. *Woods*, 12 John. 190; *Keep* v. *Goodrich*, Id. 397; *Efner* v. *Shaw*, 2 Wend. 567; *Lester* v. *Jewett*, 12 Barb. 502. Before July 5th, it was clearly optional with Mrs. Sturtevant whether she would retain the rooms for the defendant, or not;

and, indeed, it seems she did not consider them taken until the $10, demanded to bind the bargain, was paid. Prior to its payment, there was no obligation upon her part to furnish the defendant with rooms and board; and the alleged agreement upon which a recovery has been had in the court below, was therefore void for want of mutuality. 1 Parsons on Cont. 373.

Judgment reversed.

THE RIPPOWAM CO. *v.* PETER R. STRONG.

Where, upon appeal, the judgment is reversed and a new trial is ordered, and no provision is inserted in the order allowing either party to use, upon such new trial, any of the testimony previously taken, the case stands in every respect as if no trial had taken place; and it is error to allow, on such new trial, the evidence taken on the former trial to be read from the printed case.

APPEAL from a judgment entered on the report of a referee. The action was for goods sold and delivered. The cause was referred, the referee reported in the plaintiff's favor, judgment was perfected upon his report, an appeal was taken therefrom, and, on the appeal, the judgment was reversed, and a new trial was ordered. The order, omitting the recitals, was in the following words:

* * * "It is this day ordered that such judgment be reversed, and case referred back to the referee, either party to produce further testimony. Costs of trial and appeal to abide event."

On the second trial before the same referee, the plaintiff's attorney offered to read, from the printed case, the testimony taken on the former trial. It was objected to by the defendant. The objection was overruled, and an exception taken; and, the referee having reported in the plaintiff's favor, and judgment having been perfected thereon, the defendant again appealed.

S. Weir Roosevelt, for the appellant.

W. Silliman, for the respondent.

By the Court, HILTON, J.—The order made by this court at general term upon the former appeal, in effect reversed the judgment entered upon the referee's report, and sent the case back for a new trial.

No provision was made whereby either party was permitted to use, upon such new trial, any of the testimony previously taken, and consequently the case stood in the same position, in every respect, as if no trial had taken place.

It appears that, on the new trial before the referee, he permitted the plaintiff to read in evidence all the former testimony in the case, notwithstanding the defendant objected. In this the referee erred. The defendant was entitled to have the witnesses examined orally, and in the usual manner; and, the referee's report being founded upon testimony improperly admitted in evidence, the judgment entered thereon must, for that reason, be reversed.

Judgment reversed and new trial ordered, costs to abide the event.

EDWARD FALES *v.* THOMAS MCKEON.

Where a horse is sold by written bill of sale, containing a warranty as to soundness, the writing merges all cotemporaneous parol agreements—*e. g.*, an agreement that the seller will take back the horse and refund the money within a specified time,—and the purchaser is limited, in his recovery for any defects warranted against, to such damages as arise from a breach of the written warranty.

The measure of damages, in an action for breach of warranty of soundness on the sale of a horse, is the difference between the value of the horse at the time of sale considered as sound, and his value with the defects shown.

And where, in such an action, the plaintiff fails to furnish any proof of damage within this rule, the complaint should be dismissed.

APPEAL by defendant from a judgment of the Third District Court. The facts of the case are fully stated in the opinion.

Pattison & Walton, for the appellant.

Henry H. Morange, for the respondent.

By the Court, HILTON, J.—The plaintiff sues to recover damages alleged to have arisen from the sale of a horse by the defendant. It appears that in June, 1857, the defendant sold and delivered to Henry H. Morange a stud horse, wagon, harness, blankets, &c., for the sum of $200, and, on receipt of the price, executed and delivered a bill of sale, containing a warranty that the horse was sound, with the exception of being sprung in the knee. At the same time, as the plaintiff alleges, the defendant verbally agreed that if, at any time within six months, the things thus sold were returned to him, he would refund or return the money paid for them. After the purchase, the horse was stabled with the defendant about three weeks, when Morange removed him; and it was only after this removal, and after the horse had been frequently driven by Morange, that he became convinced that the horse was foundered, and otherwise unsound. He then requested the defendant to take back the articles sold and return the money, which was refused.

In November, 1857, Morange, by parol, assigned to the plaintiff his claim for the money thus paid, and damages; and, under the assignment thus made, the plaintiff seeks to recover in this action $250, being for the money paid at the time of sale, for damages arising out of a breach of the warranty by reason of the unsoundness of the horse, and also the expense paid and incurred in keeping and endeavoring to effect his cure, and in repairing the wagon. It does not appear that, at the time of the sale, a particular sum was named as the value of each article sold; but the whole was sold in one lot, at the stated price.

On the trial before the justice, evidence was admitted, on the part of the plaintiff, showing the expense of keeping the horse

rom the time of his removal from the defendant's stable, and lso respecting the alleged verbal agreement to take back the orse, made by the defendant with Morange at the time the bill f sale was delivered and the price paid. The defendant objected o the admission of this testimony, but the justice permitted it to o to the jury. No evidence was introduced by the plaintiff especting the value of the horse, either with or without the lleged defects; while the testimony on the part of the defend- nt showed that, at the time of the sale, the horse was actually orth $125, and the wagon, harness, &c., about $100. After uch conflicting evidence relative to the soundness of the horse, t the time of sale, the case was submitted to the jury, who ren- ered a verdict in favor of the plaintiff for $180.

Prior to this, however, and after the plaintiff rested, the defend- nt moved to dismiss the complaint upon the following grounds, ith others: 1st. That a mere verbal assignment of the claim ued upon, conferred no right of action upon the plaintiff, as gainst the defendant; 2d. That no damages were proved to ave been sustained by Morange, or by the plaintiff as assignee r otherwise, by reason of any alleged unsoundness of the horse. he motion was denied; and, on this appeal, we are asked to eview the decision of the justice thus made, and also to reverse ie judgment appealed from, on the ground that it is against the vidence.

From the statement of the case I have here given, it is quite bvious that, if the plaintiff acquired any right of action what- ver against the defendant, by reason of the parol assignment of he claim of Morange, he was limited in his recovery to such lamages as should be proven to have resulted from a breach of he warranty contained in the bill of sale, and which, being in riting, merged all cotemporaneous verbal agreements between he parties to it. 1 Greenleaf's Ev. §§ 275, 276. These dam- ges would consist of the difference between the value of the orse at the time of sale, considering him as sound, and his value ith the defects alleged. *Voorhees* v. *Earl*, 2 Hill, 288; *Cary* v.

Gruman, 4 Id. 625; *Comstock* v. *Hutchinson*, 10 Barb. 211; Sedgwick on Meas. of Damages, 290.

The plaintiff having neglected at the trial to furnish any proof of damage within the rule stated, the justice erred in refusing to dismiss the complaint; and, as the evidence subsequently introduced by the defendant showed that the horse, wagon, and harness were, at the time of the sale, actually worth more than the price Morange paid for them, the verdict of the jury was against the evidence, and the judgment must be reversed.

Judgment reversed.

GEORGE W. CORNING *v.* JOHN CALVERT.

C. applied to B., in writing, to procure him a loan of $7,000 on two houses and lots—$4,000 on one, and $3,000 on the other. Nothing was said in the application as to whether one or two mortgages would be given, but C. verbally stated that the money could be put in one or two mortgages, as the lender desired. B. found a person willing to loan $7,000 on one mortgage, but the loan was never made, owing to C.'s refusal to accept it unless upon separate mortgages. *Held*,

I. That B. had performed his service, and was entitled to his commission for procuring the loan.

II. That it was immaterial that B. acted in the matter through an agent—the latter having sworn that he was the agent of B., and so estopped himself from interposing any claim to the commissions.

APPEAL by defendant from a judgment of the Marine Court at general term. This was an action to recover for broker's commissions earned by one —— Britton, and assigned to the present plaintiff. The defendant applied to Britton to procure him a loan on two houses in Twentieth street, New York city. The application was in writing, and was signed by S. B. Peet. It contained a diagram of the houses, and then proceeded as follows:

"Seven thousand dollars wanted on the above houses and lots as per diagram—four thousand dollars on the house No. 74. * * *

The other house is, same as the other, No. 72, 22 1-2 by 40, lot 22 1-2 by 80—wanted a mortgage for three thousand dollars." * *

S. B. Peet, acting as the agent of —— Britton, procured a loan upon this application, and it was for the commissions on the procurement of this loan that this action was brought. Judgment was rendered for the plaintiff, which was affirmed at the general term. The defendant appealed. The facts in the case are fully stated in the opinion of the court.

William McDermott, for the appellant.

Parsons, Riggs & Riggs, for the respondent.

By the Court, DALY, First Judge.—There was no conflict of testimony in this case. The defendant applied for a loan of four thousand dollars upon one house, and three thousand dollars upon the other. Britton, to whom he applied, got Peet to negotiate the loan. Peet, having found a person who had seven thousand dollars to loan, but wanted to loan it on one mortgage, called upon Calvert, the defendant, and Calvert told him that "they could take their choice, and put it in one or two mortgages, as they wished." Peet then saw Mr. Wight, the attorney of the person who had the money, and Wight decided to loan it. Wight testified that the parties had agreed upon the loan; that the party he represented agreed to make it. A particular description of the property was then furnished to Wight. He investigated the title and completed it; but the matter fell through because the defendant's brother would not sign the bond unless the loan was in two mortgages. In consequence of which the defendant said there must be separate mortgages, and Turner, who had the money, would not loan it except upon one bond and mortgage. In all this there was no conflict in the testimony. When the defendant told Wight or Turner that there must be separate mortgages, he also said that that was *his* application. But his declaration to that effect did not countervail or amount to a denial of his previous statement to Peet that it might be in one or

two mortgages, as the parties wished. Or, if it might be regarded as evidence conflicting with the testimony of Peet, the question of fact in conflict upon the evidence, was for the justice, and his finding upon that point cannot be reviewed upon appeal.

As the case stands upon the evidence, the defendant authorized Peet, who was acting as the agent of Britton, to procure the loan, giving one bond and mortgage. If he had no authority to consent that the loan might be embraced in one mortgage, he should not have directed Peet to procure it upon such terms. It is said that Britton was not present at this interview with the defendant. But Peet was his agent; and specific instructions as to the terms, made to the agent, was the same as if made to Britton. The application given in evidence by the defendant, which was in writing, did not specify whether the loan was to be secured by one or two mortgages; but merely that three thousand dollars was wanted on one house, and four on the other. The proposition to include both sums in one mortgage, therefore, was not varying the terms of the application. It simply made them more specific. Peet's name is attached to the application, showing that the defendant negotiated or treated with him; and if Peet was acting as the agent of another, it does not lie with the defendant to interpose that objection. The service was rendered. A person was found ready and willing to make the loan upon the proposed terms. The commission was earned, and whether Peet was acting as the agent of Britton or for himself, is immaterial as respects the rights of the defendant. He swears he was Britton's agent, and is thereby estopped from setting up any claim himself. Britton called upon the defendant after Peet's interview, thus ratifying and adopting Peet's acts; and the defendant told Britton, when he called, that he would pay him one per cent. He then recognized Britton, and not Peet, as the principal in the business; and Britton, and his agent Peet, having done what they engaged to do, that is, procured a person ready and willing to loan upon the terms proposed by the defendant, the commission was earned, and the judgment is right.

Judgment affirmed.

BERNARD MAGUIRE, Assignee of HIRAM H. PLATT *v.* DAVID WOODSIDE & LUTHER HAYDEN.

The defendants, as shipping masters, agreed with P. to procure him employment on board a certain vessel, as carpenter for the voyage, at $23 a month, and to notify him of the sailing of the vessel in time to enable him to get on board. They failed to give him timely notice, and the vessel sailed without him.

In an action upon the contract, where it appeared that the breach complained of resulted in a loss of employment by P., attended by inability to obtain other service,

Held, I. That the damages recoverable were the same as if the service of P. under the agreement had actually commenced and he had been improperly discharged.

II. That proof of a custom that shipping masters, in such cases, act as agents of the captain of the vessel, was inadmissible.

III. The action being brought before the term of the employment agreed upon expired, the recovery was limited to the damages sustained up to the time of the trial.

APPEAL by defendants from a judgment of the Fifth District Court. The facts are fully stated in the opinion.

H. P. Hadman, for the appellants.

F. H. B. Bryan, for the respondent.

By the Court, BRADY, J.—The defendants, who are shipping masters, agreed, on or about the 23d January, 1857, with H. H. Pratt, the assignor of the plaintiff, to give him a berth, or to ship him on board the Lewanteen, then about to sail on a foreign voyage from the port of New York, as a carpenter, at the rate of $23 per month, and to pay him two months' wages in advance. The assignor was to receive notice of the sailing of the ship in time to enable him to get on board. The vessel sailed on the 30th January, 1857, before the assignor, after notice of the intended departure, had time to board her; and on the 9th February, 1857, this action was brought to recover damages for a violation of the contract. On the facts, the finding of the justice in favor of the plaintiff is conclusive, being fully sustained by the testimony, although it may be, in some respects, conflicting. The

only questions on this appeal to be passed upon, are, whether the offer to prove a custom, which will be stated hereafter, was properly excluded; and whether or not the damages awarded by the court below are warranted by the rules of law applicable to this and kindred cases. In this case, as already stated, the contract was made with the defendants, who are shipping masters. The offer referred to was embraced in the following question: "What is the custom of shipping men on board of ships *by the landlord* in person, *who engages to ship them;* and do they act in this matter as the agent of the captain?" A mere statement of this is sufficient to show its utter irrelevancy. The agreement herein proved, depended not upon custom, and was not made by a landlord engaging to ship another, but was made with the defendants by the assignor. The exclusion of the question was therefore proper.

It has been held that where a seaman, hired for the outward and return voyage, was improperly dismissed by the captain before the service was completed, a recovery of wages by the seaman for the whole time was proper, deducting what he had otherwise received for his services after his dismissal, and during the time for which his employer was bound to make payment, (Abbott on Ship., 4th Am. ed., 442, 443; *Hoyt* v. *Wildfire*, 8 Johns. 518; *Ward* v. *Ames*, 9 Id. 138; *Emerson* v. *Howland*, 1 Mason, 51, 52); but this case depends, in some degree, upon principles not embraced within the rule just stated. The contract here is not for services to the employer, but to secure employment under another, and a violation of that agreement. The assignor never entered upon the performance of the service promised, and there was no performance, partial or otherwise, of the actual service contemplated, although the assignor held himself in readiness to perform his contract with the defendants. Under such circumstances, the assignor could recover only the actual damages sustained by the breach complained of. The proof showed that the assignor's board, during the time he was awaiting the sailing of the vessel, was $4 per week, and that, although efforts were made thereto, he was unable to secure other employ-

ment. When the cause was tried (2d March, 1857,) a period of about five weeks had expired, and the justice found for the plaintiff, awarding the sum of $50 for damages. The board of the assignor at $4 per week, and his payment at the rate of $23 per month, would warrant a finding of at least $48.75. We cannot say that this would not be a fair compensation, recompense, or satisfaction to the assignor for the injury complained of. It is difficult to determine, in a case like this, precisely what would be the best mode of ascertaining the damages sustained; but, if the breach result in a loss of employment, and be attended by inability to obtain another service, it does not seem unreasonable to adopt the same rule, which would be applied in case the service had commenced, and the party had been improperly discharged, provided such application would not operate oppressively. Adopting this rule as suggested, there is a slight excess in the finding; but it falls within the principle *de minimus non curat lex*, and, as substantial justice has been done, the judgment should be affirmed.

Judgment affirmed.

HENRY G. BABCOCK *v.* HENRY J. RAYMOND AND OTHERS.

In an action to recover for a literary production shown to have been furnished the defendant at his request, and used by him, the opinion of the person who prepared it, as to its actual value, formed with reference to the time and labor employed in its preparation, is competent to be given in evidence, to show the amount the plaintiff is entitled to recover; and, if uncontroverted, should be deemed conclusive upon the question of value.

The proprietors of a newspaper published a standing notice, inviting voluntary correspondence containing important news, promising, if they used any such when so furnished, that it would be liberally paid for. In consequence of this notice, an article of a political character, purporting to contain statistics of the views of people in different parts of the country respecting the presidential candidates at the then coming election, was prepared, and sent with a request that if it was not desired, to return it, that the writer might get a market for it elsewhere.

The article was retained and published. *Held*,

I. That, under the circumstances, the defendants, by publishing the article, should be considered as admitting it to be of the character which their notice invited, and were liable for its value.

II. The testimony of the writer, giving his opinion of its value, formed with reference to the time and labor employed upon it, standing uncontradicted, was sufficient to entitle the plaintiff to a judgment for the amount stated.

III. Upon such evidence, the justice erred in dismissing the complaint at the trial.

APPEAL from a judgment of the District Court for the first district. The action was brought against the proprietors of the New York Times, to recover for the services of plaintiff in the preparation of an article published in that paper.

On the trial before the justice, the plaintiff was sworn in his own behalf. He testified to having seen in the Times a standing notice that voluntary correspondence containing *important news*, was solicited, and, if used, would be liberally paid for. In consequence, he prepared the article in question. (A copy of this article was put in evidence. It contained a summary of results of a canvass said to have been made by him in the summer of 1856, of the preferences of electors and others relative to the presidential election then pending.) He sent this article to the editor of the Times, with a letter to the effect that if he did not wish it, to return it, that he might get a market for it elsewhere. The article was published, but had not been paid for. He considered it worth $20.

On cross examination, he stated, among other things, that he might have sent his letter separately from the article.

The plaintiff having rested, the justice, on motion of defendants, dismissed the complaint; and the plaintiff appealed.

The plaintiff, in person.

Waldo Abbot, for the respondents.

By the Court, HILTON, J.—The defendants, proprietors of the New York Daily Times, a newspaper printed in this city, pub-

lished at the head of its columns a "Notice to Correspondents," as follows: "Voluntary correspondence, containing important news from all quarters of the world, is solicited; if used, it will be liberally paid for." In September, 1856, and while the probability of the election of Mr. Fremont to the position of President of the United States, was a subject much discussed and commented upon in our newspapers and elsewhere, the plaintiff prepared and sent to the defendants a communication containing statistics, observations, and results, stated to have been derived from an actual canvass by him of the views, principles and preferences of persons of all classes, and both sexes, traveling upon many of the railroads and other routes throughout the country, respecting the several candidates for the presidency, which were to be voted for at the then ensuing general election. The defendants published the communication in their paper. It occupied about half a column of the daily issue of September 13th, 1856, and was preceded by an editorial paragraph assuring the public of the conscientious accuracy, and reliability of the record contained in it.

The object of these statistics and observations, and their publication thus endorsed, seems, from a careful perusal, to have been for the purpose of arriving at certain results which are declared to have been obtained from the facts there stated. And, to show the important character of the communication, in it the particulars are given of 43 separate canvassings of promiscuous companies of persons traveling over different routes and sections of country, which it was alleged established the following extraordinary "results" or conclusions: 1. That among the traveling and intelligent portions of the community, Mr. Fremont had twice as many partisans as both the other candidates, Buchanan and Fillmore, together; while in the rural districts and back settlements—where, it seems left to inference, the people are not so enlightened or intelligent—opinion was pretty equally divided between Fillmore and Buchanan. 2. That, of the voters between 21 and 60, from five-eighths to five-sixths were for Fremont; while, of those over 60, nearly two-thirds were for Buchanan.

3. That seven-eighths of all our literary men, professors, &c., and nearly every minister of the gospel, would vote for Fremont; while about four-fifths of all the voters for Buchanan were opposed to the Maine liquor law. 4. That nearly every district in Pennsylvania would go for Fremont, while the state would probably go for Buchanan. 5. That a very large proportion of all the ladies were for Fremont—indeed, it appeared that, in this preference, very many of them were in direct opposition to their husbands, although it was admitted "that Mr. Fillmore's fine personal appearance had not been without its effect." Finally, That these "results" contained "facts of the most cheering character," which may be thus briefly stated:

"That young men are more honest than old ones, and are overwhelmingly for Fremont;" and, as a consequence, the future public virtue and permanency of our republican institutions are secured. That ministers, men of science, loveliness, (evidently referring to the female sex), virtue, temperance, and intelligence throughout the land, were for Fremont. The concluding inquiry in the article, "Who can be against us?" assuming all the previous statements and conclusions to be accurate, seems not only unnecessary, but rather difficult to answer.

It will not be denied that, if by the plaintiff's communication these results and conclusions were satisfactorily established in advance of the people expressing their views and preferences in the usual method, it would at the time have been deemed "important news," in the largest sense of that term, to any newspaper or person professing a partiality for the election of Mr. Fremont; and, as by reference to the copy of the defendants' paper containing the article, and attached to the return on this appeal, it appears that they so professed, there seems no reason for doubting that they regarded it as containing not only "important news," but information valuable to their readers.

On the trial before the justice of the First District Court, and from whose judgment this appeal is taken, the plaintiff proved that he prepared the article in consequence of the notice referred to, and sent it to the defendants, requesting, before its publication, if it was

not liked, to return it, that he might get a market for it elsewhere, —thus plainly informing them that it was intended for sale, and, if they used it, he was to be paid what it was reasonably worth. The paper in which it was published, being then put in evidence, afforded a presumption, at least, that the defendants accepted it upon the terms thus proposed, and that in their estimation it contained information of importance and value. It was further proven by the plaintiff that the production of this article cost him ten days of hard labor, and that he considered it worth $20. Apart from this testimony, it is manifest, from the editorial preface, that the defendants believed it to be of some value, and that the facts alleged in it had been conscientiously collected and recorded; that its publication would be beneficial in showing to the opponents of Mr. Fremont the uselessness of further opposition; and that the facts and conclusions in it, to use the language of the communication, "augured well for future public virtue, and the permanency of our republican institutions."

This evidence was not in any way controverted, (the defendants offering no testimony), and the justice erred in disregarding it and dismissing the complaint. He was not justified in determining the character and value of the communication by the result of the subsequent election to which it related, and was intended to affect; nor was he warranted in regarding facts and results, shown to be so accurately and conscientiously collected, as a useless fabrication, intended to influence unsettled or weak minds in favor of Mr. Fremont, and to induce them to vote for him in preference to the other candidates then before the people.

The defendants were, and are still, engaged in the publication of a valuable and highly influential newspaper, intended for the information of, and not for the purpose of misleading, the public; and, as the plaintiff testifies that he spent much time and labor in preparing the article, it would be obviously unjust to both parties to assume, under all the circumstances, that they did not at the time honestly believe that the facts and results stated in it embodied information which, in their opinion, was not only valuable, but important. It therefore came within the class of cor-

respondence referred to by the defendants in their notice; and, having been used, should be paid for.

The opinion as to its actual value was, as we have seen, formed with reference to the time and labor employed, and was at least presumptive evidence upon the question as to the amount the plaintiff was entitled to recover, and, standing uncontradicted as in this case, might have been regarded as conclusive. *Crane* v *Morris*, 6 Peters, 598; *Kelly* v. *Jackson*, Id. 622.

Judgment reversed.

EZEKIEL S. LOCKWOOD *v.* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

It seems that municipal corporations are not responsible for injuries to third persons arising from the negligence, want of skill, or carelessness of contractors, or those employed under them, while engaged in the prosecution of repairs upon the streets of the city.

But it is otherwise where the injury is occasioned, not by any fault of the contractor or his servants, but is the result of an act which the corporation, by their contract, direct to be done. In such a case, the principle of *respondeat superior* applies. Where the contractor has merely done what he was required to do by the contract, he is not the party to be made responsible; but those who directed him to do the act must answer for the damage occasioned thereby.

APPEAL by defendants from a judgment of the First District Court. This action was brought to recover damages for injuries occasioned to the plaintiff's house in the building of a sewer. By contract made in September, 1854, with the defendants, through the Croton Aqueduct Board, Abraham H. Legett was employed to construct a sewer running from the East river through Forty-ninth street to Second avenue, thence up that avenue to Fifty-third street, through Fifty-third street to Third avenue, and thence up that avenue to Fifty-sixth street. By the terms of the contract, Legett was required in all

cases to draw the sheath-piling as the work progressed, unless directed otherwise in writing by the Board. The work was performed under this contract by John L. Brown, in place of Mr. Legett. It was done under the supervision of an inspector appointed by the Croton Aqueduct Board.

The plaintiff's premises were in Fifty-third street, between Second and Third avenues. At this place, the excavation for the sewer was 22 feet deep and 16 feet wide. Two inch spruce plank were used to shore up and prevent the caving in of the earth. On the completion of the sewer, the rest of the excavation was filled up with dirt, and these plank (which constitute what is called "sheath-piling") were withdrawn. The contractor testified that the sheath-piling should have been left in, and that he spoke to the inspector about it; but, receiving no directions to leave it in, drew it out, being required to do so by the contract. In consequence of the drawing of it out, the earth on each side settled, and the plaintiff's house was injured, his stoop was broken off from its fastenings to the house and pitched over forward, the stones in the yard were broken, and the railing disjointed, &c. It was to recover damages for these injuries that this action was brought. Judgment was rendered for the plaintiff, and the defendants appealed.

Abraham R. Lawrence, jr., assistant corporation counsel, for the appellants.

Bogardus & Brown, for the respondent.

By the Court, DALY, First Judge.—This case is distinguishable from *Blake* v. *Ferris*, 1 Seld. 48; *Pack* v. *The Mayor*, 4 Id. 227; and *Kelly* v. *The Mayor*, 1 Kern. 432. In these cases, the corporation was sought to be made responsible for injuries to third persons arising from the negligence, want of skill, or carelessness of the contractors, or those employed under them, while engaged in the prosecution of the work. In this case, however, the injury was the result of drawing the sheath-piling—which the contractor,

by the terms of the contract, was required to do—as the work progressed. It did not appear that there was any want of skill, negligence, or carelessness on the part of the contractor in doing what, by the terms of the contract, he was required to do. He testified that it was a proper case to leave the sheath-piling in; that he spoke to the inspector about it, under whose directions the sewer was to be built; but, as he was not directed to leave it, he withdrew it in compliance with the terms of the contract; that if it had been left in, the earth would have remained as it was; that the earth naturally settles after the sheath-piling is drawn; that the earth, in the place where the injury occurred, was more unstable, and tended more to press in, than in other places; that the earth could not be rammed in so hard as to prevent settling, after the drawing of the sheath-piling, in such a wide and deep excavation; that, after it was drawn, the sidewalk settled, the stones yielding apart, and that, according to the contract, he could not have executed the work any better; that in some few places, in the Third avenue, he was directed to leave the piling in, and did so. It further appeared by the testimony that the stoop was in good order before the piling was drawn; that, on the day it was drawn, the stoop gave way; the earth drew off in a body, when the stoop pitched forward some three inches at the top, and an inch and a half at the bottom; the iron fastenings which attached it to the house were broken, the stone into which the railing was fastened was broken, and the railing was drawn out, broken, and disjointed.

As the injury was the result of an act which the defendants, by their contract, directed to be done, the principle of *respondeat superior* applies. The contractor, having merely done what he was required to do by the contract, is not the party to be made responsible; but those who directed him to do the act must answer for the damage. As the injury could have been avoided by leaving the piles in, as was done in certain places in the Third avenue, it was inexcusable negligence to require them to be drawn.

Judgment affirmed.

JOHN M. KOPPER *v.* AMASA B. HOWE.

An action upon a judgment rendered in one of the District Courts, may be brought by a party to whom it has been assigned, without leave of the court first obtained. Such leave is only necessary where the action is between the original parties to the judgment.

APPEAL by defendant from a judgment of the Third District Court. The action was brought by the plaintiff upon a judgment recovered by Gershom A. Seixas, against the defendant Amasa B. Howe, on the 16th day of December, 1857, in the First District Court, for the sum of $24.25, and assigned to the plaintiff. The only question was, whether he could maintain the action without showing leave of court first obtained to bring it.

Judgment was rendered for the plaintiff, and the defendant appealed.

James Parks, for the appellant.

Thomas B. Van Buren, for the respondent.

By the Court, BRADY, J.—An action cannot be brought on a judgment rendered in one of the District Courts of this city, without leave of the court, (*Mills* v. *Winslow*, 2 E. D. Smith, 18, *Thomas* v. *Sutphen*, Id. 537), where the parties are the same; but where the action is not between the same parties, it may be brought without leave of the court. *Tuffs* v. *Brainard* (1 Abb. 4,) approved *Wheeler* v. *Dakin*, (12 How. Pr. R. 540), and relied on *McButt* v. *Hersch*, (4 Abb. 441.) Section 41 of the Code prohibits the action on a judgment where it is between the same parties, and there is nothing in the section relating to leave to be obtained, which will justify the enlargement of the prohibition, so as to embrace actions not between the same parties. No right

of action is taken away by section 71, and the assignee's right to sue, resulting from his assignment, is not restricted by any provisions of the Code, except those providing for the time of commencing actions, §§ 74, 90.

Judgment affirmed.

GUSTAVUS V. CHURCHILL AND ANOTHER *v.* MARY MALLISON AND ANOTHER.

An order vacating a judgment entered by default, and letting the defendants in to answer upon their showing a defence and excusing their neglect, is not appealable.

Such an order can be reviewed only upon obtaining the certificate required by rule of this court of March 22d, 1851, which is granted in all cases where the judge making the order deems the question of such importance and doubt as to render a review proper.

APPEAL by plaintiffs from an order at special term, setting aside a judgment and permitting the defendants to defend. The defendants moved to dismiss the appeal.

Lowe & Daly, for the appellants.

Doolittle, Ward & Wilcoxson, for the respondents.

By the Court, HILTON, J.—A judgment in this action was entered by default, upon the defendants' failure to answer. Upon an affidavit excusing the neglect, and showing a defence, a motion was made on their behalf, at special term, to vacate and set aside the judgment, and permit them to defend. From the order granting this motion, the plaintiffs appeal to the general term.

In *Mead* v. *Mead* (2 E. D. Smith, 223,) it was held that an order of this nature rested in the discretion of the judge making it,

and was not appealable under sec. 349 of the Code. See, also, *Seely* v. *Chittenden*, 10 Barb. S. C. 303; *Sherman* v. *Felt*, 2 Com. 186. It can only be reviewed upon obtaining the certificate required by the rule of this court of March 22, 1851, and which is granted in all cases where the judge making the order deems the question of such importance and doubt as to render a review proper. The certificate not having been obtained the appeal is therefore dismissed.

Appeal dismissed, with costs.

SAMUEL TOOKER *v.* GEORGE W. GORMER.

The declarations of a party in respect to the subject matter of a suit, may always be given in evidence against him, and especially so when such statements have been made under oath as a witness in a court of justice in another cause.

The declarations of a third person, neither a party nor a privy, and not part of the *res gestæ*, are receivable only for the purpose of contradicting him when he has been examined as a witness against the party, who offers such statement in evidence with the design of impeaching him, and it is then receivable only after he has been asked, while under examination, if he has made such a statement or declaration.

But if the declarations be improperly received, the error will be cured by the adverse party's calling such person to the stand as a witness, and examining him in respect to such declarations, as well as upon the subject matter of the suit generally.

Where goods are entrusted to a common carrier, accompanied with a bill and instructions not to deliver the goods unless paid therefor by the consignee, he is liable to the consignor for a delivery without payment being exacted. By thus assuming to act with the goods as his own, he is answerable for their value; but he may discharge himself from liability by procuring their return.

It seems that an endorsement upon the bill, "Please collect the bill," is a mere request, with which the carrier may or may not comply; and is not, of itself, sufficient evidence of an undertaking or agreement on his part not to deliver the goods unless paid for.

APPEAL by defendant from a judgment of the First District Court. In May, 1856, the plaintiff delivered to the defendant's express,

running between New York and Bloomfield, a cask of crockery to be carried to one A. Livingston, with directions to collect the bill therefor on delivery. A Mr. Kent was employed at the time as the driver of the express. The goods having been delivered without collecting the bill, an action was commenced therefor against Mr. Kent, in which judgment was rendered against the plaintiff, it appearing that Mr. Kent was not the owner of the express. This action was then brought against the present defendant. Upon the trial, a witness who was called for the plaintiff testified that he was present at the trial of the suit against Mr. Kent; that the present defendant was called on that trial as a witness for the defence, and testified that, at the time the goods in question were given to the Bloomfield express, he was its owner, and Mr. Kent was employed by him as driver. Also, that Mr. Kent was sworn on that trial, and testified that he had taken the goods to West Bloomfield, with instructions not to deliver them without the money; but that he left them at a store for Mr. Livingston, the consignee, and they had been delivered, and the bill not paid. This testimony as to the evidence of Kent and the defendant on the former trial, was objected to; but the objection was overruled and an exception was taken.

Charles Kent was called as a witness for the defendant, and testified that he was the person previously sued for having delivered the goods without collecting the money; that he was never directed not to deliver the goods without collecting the money; that the only direction ever given to him was contained in the bill itself, on which was written "Please collect the bill;" but he did not contradict the testimony of the plaintiff's witnesses that he had sworn, on the other trial, that such directions were given to him. Judgment was rendered for the plaintiff, and the defendant appealed.

C. F. Wetmore, for the appellant.

E. R. Bogardus, for the respondent.

By the Court, DALY, First Judge.—The statements made by

he defendant under oath, as a witness in the suit between the plaintiff and Kent, were admissable to charge him. *Collet* v. *Lord Keith*, 4 Esp. 212; *Milward* v. *Forbes*, Id. 171. The declarations or statements of a party in respect to the subject matter, may always be given in evidence against him, and especially so when he statement was made by him as a witness in a court of ustice.

The declarations of Kent, as they formed no part of the *res estæ*, were not admissible. The declarations or statements of one, neither a party nor a privy, are receivable only for the purpose of contradicting him when he has been examined as a witness against the party who offers the prior statement with the lesign of impeaching him, and is then only receivable if he has been asked, while under examination, if he has made such a statement or declaration. But although the evidence, when offered, was improperly received by the justice, the defendant cured the error by calling Kent to the stand as a witness, and examining him, not only in respect to the declarations attributed to him, but upon the subject matter of the suit generally. The most material declaration of Kent, given by the plaintiff in evidence, was his statement to the witness Tooker that he had taken the goods to West Bloomfield with directions *not to deliver them without the money.* When Kent was examined as a witness by the lefendant, he testified that the only instructions he ever received especting the goods, was what was written on the bill accompanying them—"Please collect the bill." This formed no part of his duty as a carrier. It was a mere request, which he might or night not comply with; and would not, of itself, be sufficient evidence of an engagement or undertaking on the part of the defendant not to deliver the goods unless paid for. But Kent did not deny that he told Tooker that, when he took the goods, he received directions not to deliver them without the money. The lefendant did not interrogate him upon that point, and the justice therefore had the right to conclude that he made such a statement. If he did, it was in conflict with what he swore upon the rial; and, as there was no denial that such a statement had been

made by the witness, nor any explanation given to obviate its effect, or show that it was otherwise or different than as testified to by Tooker, it was for the justice, under the circumstances, to say whether that statement was the true one, or the one given by the witness upon the trial. If the witness had delivered the package in neglect of such instructions, then he was interested in the event of the suit, as he would be liable over to his principal, if there should be a recovery against the principal for the witness' neglect; and this was a matter to be weighed by the justice in considering the conflict between his previous statement—after an ample opportunity had been afforded for explaining it, if it could be explained—and his statement on the trial. The finding of a justice, like that of a jury, upon such a point, will never be disturbed or reviewed by an appellate tribunal.

That the error of admitting the declaration of Kent was cured by the defendant's making him a witness, will appear very plainly. These declarations or previous statements of the witness were clearly admissible to impeach or contradict the testimony he gave on behalf of the defendant; and, as they were already in evidence, it would have been an idle ceremony to recall the witness Tooker to give the same testimony over again. Where it is designed to impeach the credit of a witness by showing that he has made statements inconsistent, or in direct conflict with what he has sworn to upon the trial, it is necessary for the party, who designs to impeach his credit, to ask him, while he has him under examination, if he has made such statements, that the witness' attention may be called to the fact, and an opportunity afforded him either of denying it, or of stating what he did say, or of giving any explanation that may tend to support the consistency or integrity of his sworn statement. But in this case the witness and the defendant had all the benefit which this rule was designed to secure. Kent was in court when Tooker was examined. He was called himself, afterwards, as a witness, and an ample opportunity was afforded him to deny the truth of Tooker's statement, or to give any explanation that either he or the defendant deemed essential. The defendant neglected, or did

not think fit, to interrogate him upon the point; and it does not lie with him now to ask a reversal of the judgment upon this ground, when he had every advantage upon the trial which this rule of evidence could afford.

If the justice had believed the statement of Kent upon the trial, that he left the package at a store, where he was directed to leave it by the person to whose care it was addressed, and that all the instructions he received with it was to collect the bill, it would have been an ample defence. But it was in evidence that Kent told Tooker that he had directions not to deliver it without the money, but had delivered it without the money; that he had not been as careful as he should have been, as he had just bought out the express, and was anxious for patronage. Tooker's testimony to this effect was not denied, qualified, or questioned by Kent when he came upon the stand. The justice, therefore, was bound to conclude that Kent had so told Tooker, and was at liberty to infer that what he then told was the truth. He was at liberty to infer it from the silence of Kent respecting a statement so materially in conflict with the facts, as he represented them upon the trial, from the omission of the defendant to question him upon the point, and from the fact that, after a suit was commenced against the defendant, there may have been a strong motive on the part of Kent to represent the facts to be otherwise, to prevent a recovery which might lay the foundation for a subsequent suit against him.

I think there was sufficient in the evidence to warrant the conclusion of the justice that the defendant agreed, when the package was entrusted to him, not to deliver it unless the money was paid; and if he did, he is answerable for its value if he assumed the responsibility of delivering or parting with it without receiving the money. By such an act he takes the risk, which the owner was not willing to take, of trusting to the credit or future ability to pay, of the person to whom he delivers it. It was in evidence, and not contradicted by Kent, that Kent said he should not have delivered the goods, but he thought Livingston was responsible. So far, therefore, as respects the defendant's liabil-

ity to the plaintiff, it is the same as if he had collected the money. He, or the agent to whom he entrusted the matter, saw fit to give credit to a man to whom the seller was not willing to give credit. This was assuming to act with the property as his own, and, having thus taken upon himself all the authority of an owner, he must pay for the goods, unless he can get them back and discharge himself from responsibility by advising the plaintiff that they are in his custody at West Bloomfield, subject to his order. The responsibility of the defendant does not arise from his implied duty as a carrier, but from the special contract which the justice has concluded that he made, not to deliver the goods without the money. The contract which the law implies, may be enlarged by the agreement of the parties, and then the carrier is bound to the full and exact performance of the particular agreement he makes. Story on Bailments, §§ 81, 82; Angell on Carriers, §§ 37, 59, 60. If Livingston, or the person to whose care the goods were sent, was not prepared or willing to pay for them, when advised by the defendant's agent at West Bloomfield that they were in his custody and ready for delivery, it was the duty of the defendant's agent to retain the package and advise the plaintiff that it had not been paid for, and was held subject to his order. The plaintiff then became responsible for the expense of its safe keeping, and the position and responsibility of the defendant was changed to that of an ordinary bailee for hire, or warehouseman.

To entitle the plaintiff to recover in a case like this, all that it was necessary for him to show was, what he did show, that the defendant wrongfully delivered the goods. This, *prima facie*, is sufficient to entitle him to recover their value. *Devereux* v. *Barclay*, 2 B. & Ald. 703; *Cooper* v. *Willamot*, 1 Man. Gr. & Scott, 672; *Loeschman* v. *Machin*, 2 Starkie, 311; *Bryant* v. *Wardell*, 2 Exchq. 479; *Valpy* v. *Saunders*, 12 Jurist, 483; 1 Chitty's Pl. 140, 141.

Judgment affirmed.

JOSIAH PAYTON, Receiver, &c., *v.* JOHN WIGHT and EDWARD J. ROBERTS.

In an action upon two promissory notes, against M. & A., as maker and endorser respectively, the latter, A., gave to the plaintiff renewal notes endorsed, the plaintiff discontinued the suit against him, gave him up the original notes, and perfected judgment against M., the maker. The renewal notes were not paid. *Held*, that A. was not entitled to an assignment of the judgment.

I. Such an arrangement did not operate as an assignment of the claim in suit to A., nor entitle him to an assignment of the judgment against M., until the renewal notes were paid.

II. A., not having performed his obligation, viz., that of paying the renewal notes, could not require an assignment of the judgment against M. to him, the agreement to give such an assignment being founded upon the implied understanding that such renewal notes would be paid at maturity.

A court of equity will not compel specific performance of a contract where the obligations of the party seeking relief have been disregarded, or are incapable of being substantially performed by him.

APPEAL by plaintiff from a judgment of the court at special term dismissing the complaint.

The plaintiff brought this action as receiver of Daniel Adee, appointed after the return of an execution unsatisfied in favor of R. J. Richards. The complaint alleged that Adee, on the 8th of February, 1851, purchased of the defendants and paid them for a certain judgment, which they were about to obtain against A. W. Metcalf, on notes endorsed by Adee. That Adee paid for said judgment by giving his own notes, which were accepted in full payment therefor, and that the defendants agreed to assign the judgment, when obtained, to Adee. And it prayed that the judgment might be assigned to the plaintiff.

The defendants admitted, by their answer, the recovery of the judgment, June 18th, 1851. They denied the purchase, and the agreement to assign, as alleged; and stated that Adee was sued with Metcalf, and that, at his request, they discontinued the suit against him, gave him time, and took new notes from him, with an accommodation endorser, agreeing, on payment of the

new notes, to assign the judgment against Metcalf to him, and not otherwise.

Upon the trial, it appeared that the suit in which judgment had been recovered against Metcalf, was brought upon two notes of $500 each, Metcalf being the maker, and Adee the endorser. That judgment was perfected against Metcalf, but the suit was discontinued against Adee, the then plaintiffs (now defendants) receiving from Adee ten notes, endorsed by one James McAlister, for the amount with interest, and giving to Adee the two $500 notes sued upon. The evidence was conflicting whether Wight & Roberts agreed to assign the judgment against Metcalf to Adee, or not. Only three of the ten notes given by Adee were paid. The cause was tried before Judge DALY, without a jury, who found "that no agreement was made by the defendants with said Adee, to assign the judgment against Metcalf to him, except on payment of the notes given by Adee to Wight & Roberts; and that the plaintiff, as receiver of Adee, had no right, as matter of law, to require, and was not entitled to receive, an assignment of said judgment to him while said notes remain unpaid," and rendered judgment for the defendants. The plaintiff appealed.

A. R. Dyett, for the appellant.

I. Whether there was an agreement by the defendants to assign the judgment to Adee, as stated in the complaint, or not, yet the giving of the new notes with McAlister's endorsements, which which was a new security by Adee, and the delivery of the notes of $500 each, on which the suit in which the judgment was obtained was brought, was, under the circumstances, in law and legal effect, a payment of the notes by the endorser to Wight & Roberts, and they had no right to enter the judgment against Metcalf for their own benefit, or except for the benefit of Adee; and Adee, as security and endorser, had a right to be subrogated to all their securities and means of enforcing the judgment against Metcalf.

II. Whether there was an agreement to assign the judgment

or not, Adee could not enforce payment of the notes of Metcalf from him without the judgment, and it was necessary that he should have it for that purpose, and Wight & Roberts, by their act in entering the judgment, had thus disenabled Adee from enforcing payment of the notes from Metcalf. 1 Paige, 329; 18 Johns. R. 505; 1 J. C. 137; 10 Johns. R. 524; 2 J. C. R. 554; 4 Id. 123; 8 Paige, 117; 6 Id. 521; 3 Barb. Ch. Rep. 338; 1 Comst. 595; 5 Cow. 202; 7 J. C. R. 90; 9 Cow. 147; 9 Wend. 80.

III. Whether there was an agreement to assign the judgment or not, the delivery of the two $500 notes to Adee, under the circumstances, was an assignment of the claim then in suit as against Metcalf, after action brought and before judgment to Adee, and the subsequent proceedings and judgment in that suit were for the benefit of Adee, though in Wight & Roberts' name, and they only held the judgment as trustees for him, and were bound to assign to Adee as *cestui que trust*. 17 Johns. R. 51, 284; 19 Johns. R. 95, 342; 2 Story's Eq. 311; Willard's Eq. Jur. 463.

IV. If any objection be made that the complaint alleges only a purchase of the claim, and an agreement to assign, it is too late to take the objection now, no such specific objection having been taken at the trial. 4 Kernan, 148.

Geo. C. Goddard, for the respondent.

By the Court, BRADY, J.—The defendants sued Daniel Adee as endorser, and A. W. Metcalf as the maker, of two promissory notes of $500 each. Adee applied to the defendants for a discontinuance of the action against him, stating that if it were continued against him, it would embarrass him very much, and offering his notes, to be endorsed, in settlement. The defendants accepted the proposition of Adee, and ten notes were given, endorsed by Mr. James McAlister. Seven of the ten notes so given were protested for non-payment, and were not paid. The defendants delivered the $500 notes, upon this settlement having been made, to Adee, and he delivered them to Metcalf; and Adee insists that it was a part of the arrangement made between

im and the defendants that judgment was to be perfected against Metcalf, and the judgment assigned to him by them. This is denied, and was one of the issues presented. The judge presiding at the trial found, on this issue, as follows: "That no agreement was made by the defendants with Adee to assign the judgment against Metcalf to him, except on payment of the notes given by Adee to them." The evidence fully sustains this finding, and the judgment predicated upon it cannot be disturbed unless the delivery of the $500 notes to Adee—as it is claimed by the plaintiff in this action—operated as an assignment of the claim in suit against Metcalf, and entitled Adee to the judgment perfected against Metcalf, and to all the benefits to be derived therefrom. The authorities to which we were referred do not sustain such a proposition, and it is not the law in this state. Here, there was no agreeement to assign until the notes were paid, nor was there any agreement that the defendants should yield the personal liability of Metcalf until the notes given by Adee were paid. The defendants were entitled to judgment against Adee, and had a right, in addition to his personal responsibility and that of Metcalf, to require further security by way of endorsement, as a consideration for extending the time of payment and waiving the judgment. The fact being established, that there was no agreement to assign the judgment until the notes were paid, negatives all implied contracts in relation thereto, and defeats the application of any rule of law which would contravene that agreement. It was proper that the $500 notes should be given to Adee, because he had substituted other notes for them, and Metcalf's liability upon them was merged in the judgment They were no longer of value to the defendants, whose remed upon them was exhausted as to Metcalf, and released as to Ade There is, however, another objection to the plaintiff's recove This action is brought for a specific performance of an alle parol agreement to assign a judgment, and it appears conclusiv that the reciprocal obligation of Adee has not been perfor He has not paid the notes given as the consideration of the a ment to assign, and cannot recover, for that reason, on well e

lished principles of equity. 2 Story's Eq. Juris. §§ 736, 750, 769. It is said, in section 736, that if the obligations of the party seeking relief have been disregarded, or are incapable of being substantially performed by him, courts of equity will not interfere. It would not be equitable to compel an assignment of the judgment against Metcalf, the effect of which would be to apply its proceeds to the payment of a debt of Adee not in favor of the defendants, and to leave the consideration of that assignment unpaid.

Judgment affirmed.

ROBERT MCC. BUTT AND OTHERS *v.* WILLIAM AND THOMAS HOGE.

No precise form of words, nor is any particular manner, necessary to be used in giving the drawers of a bill of exchange notice of its dishonor, so as to render them liable thereon. If the bill is described in the notice with such distinctness and certainty as will enable the party to ascertain from it the particular bill to which it refers, and, in addition, imports that it has been dishonored, it is sufficient.

Notice of protest need not inform the party notified that he is looked to for payment. That may be inferred from the nature of the notice.

Nor need it be in writing. Verbal notice is sufficient.

A bill of exchange drawn on London, was protested there for non-payment, and returned by the first mail steamer to the payees in New York. On its arrival, one of the payees took it to the place of business of the drawers, who were partners, saw one of them, laid the bill and protest on his desk before him, and informed him of its dishonor. *Held*, sufficient notice to render the drawers liable thereon.

When a bill of exchange is expressed in the currency of a foreign country, the amount due on it must be ascertained and determined by the rate of exchange or the value of such foreign currency at the time of demand of payment.

But in an action on a bill expressed in English currency, no proof of value need be given. The value of a pound sterling is fixed by Act of Congress at $4.84, and, in the absence of other evidence, that Act is conclusive upon the question of value, and the court is bound to take judicial notice of it.

APPEAL by defendants from a judgment upon a trial before

ıe court without a jury. The facts are fully stated in the opinon of the court.

Cummins, *Alexander*, and *Green*, for the appellants.

C. Bainbridge Smith, for the respondents.

By the Court, HILTON, J.—This action is upon a bill of exchange for £2000 sterling drawn by the defendants, to the order of the plaintiffs, upon a firm in London, accepted, and subsequently protested for non-payment. On the trial before Judge BRADY, without a jury, it appeared that the bill became due, and was protested at London, on November 26th, 1857. It reached the plaintiffs here, by the first subsequent mail steamer which arrived, on December 14th, when the plaintiffs immediately went with it to the defendants at their place of business, saw William Hoge, and, laying the bill and protest on his desk before him, informed him of the dishonor. Upon this proof the plaintiffs rested, when the defendants moved to dismiss the complaint upon two grounds: 1*st*. That the notice of protest was insufficient; 2*d*. That plaintiffs had not proved the amount due on the bill. The judge denied the motion, and gave judgment for the plaintiffs, computing the amount due according to the valuation put upon the pound sterling by the Act of Congress on that subject passed July 27th, 1852, and which declares that in all payments by or to the treasury of the United States, it shall be deemed equal to $4.84; and the same rule is applied in appraising merchandise where the value is by the invoice in pounds sterling. Dunlap's U. S. Stats. at Large, 997.

The defendants ask to have this judgment reversed, and we are called upon to examine the questions presented at the trial.

1*st*. No precise form of words, and no particular manner, was necessary to be used in giving the defendants notice of dishonor; nor was it required to be in writing. Verbal notice was sufficient. 1 Chitty, jr., on Bills, 70; Story on Bills, §§ 382, 390 *Cuyler* v. *Stevens*, 4 Wend. 566.

In all cases it is enough if the bill is described in the notice with such distinctness and certainty as will enable the party notified to ascertain from it the particular bill to which it refers, and, in addition, imports that the bill has been dishonored. Bayley on Bills, 253; 1 Chitty, jr., on Bills, 70; *Shed* v. *Brett*, 1 Pick. 401; *Smith* v. *Whiting*, 12 Mass. 6; *Mills* v. *Bank of U. S.*, 11 Wheat. 431; *Woodin* v. *Foster*, 16 Barb. 146; *Cayuga Co. Bank* v. *Worden*, 2 Selden, 19. And it may now be considered settled, upon the authority of well adjudged cases, that where the notice is given by the holder or by his order, it need not inform the party notified that he is looked to for payment, because such may very reasonably be inferred from the nature of the notice, or otherwise it would not have been given. *Bank of U. S.* v. *Carneal*, 2 Peters, 543, 553; 3 Kent's Com. 103; *Ransom* v. *Mack*, 2 Hill, 587; *Margesson* v. *Goble*, 2 Chitty's Rep. 364.

The notice was clearly sufficient. With the bill on the desk before him, the defendant could not well be misled as to the particular draft which had been dishonored; nor could he mistake the object of the plaintiff's calling with it, attached as it was to the notary's certificate of protest for non-payment, which, by statute (2 R. S. 284, § 55,) is declared to be presumptive evidence of the facts contained in it.

2*d*. The bill being expressed in money of a foreign country, the amount due on it was to be ascertained and determined by the rate of exchange or the value of such foreign currency at the time of such demand of payment. 1 R. S. 771, § 21. If, therefore, a single witness had testified on the trial that on the day the bill became due he purchased, at a banking house in this city, exchange on London, and paid for it at the rate of $4.84 for a pound sterling; and that that, he believed, was the market rate on that day, there probably would exist no doubt, in the mind of the counsel for the defendants, that such testimony, standing alone and uncontradicted, would be controlling evidence as to the value. And yet, the evidence furnished by the Act of July 27th, 1852, was of a much higher character, and would far outweigh any evidence upon the subject of the value of a pound

sterling in this country, which could be furnished by the testimony of a witness. It is not evidence founded upon the arbitrary views of any particular man or class of men, but it shows a value fixed by the Federal Government in all its dealings with the public, and the current rate or value at which a pound sterling was and is received by its numerous officers, not only in this city and state, but throughout the country.

The act being a public one, the court was bound to have knowledge of it, and, in the absence of other evidence, it was conclusive upon the question of value.

I see no error in the ruling of the judge at the trial, or in the judgment rendered, and it must therefore be affirmed.

Judgment affirmed.

RICHARD WILLIAMSON, President of the Bull's Head Bank *v.* JOHN T. MILLS.

A dealer with a bank, upon effecting with it a call loan, lodged, as collateral security for its repayment, notes endorsed by the defendant. On the loan being called in, the cashier of the bank, acting under the impression that the amount on deposit by the dealer was sufficient to cover the sum owing, delivered the securities to the dealer, who returned them to the defendant. Afterwards, upon the cashier requesting their return, they were obtained from the defendant, who, at the time of giving them up to the dealer, said he might take them back to place matters just where they were when they were given up to him by the bank.

It appearing that the loan had not been paid, *held*, in an action afterwards brought by the bank against the defendant as endorser on the notes thus lodged as collateral, that the mere charge of the loan in the dealer's account, in the absence of proof that the amount on deposit was sufficient to cover the charge, was not such an act as operated to discharge the defendant from liability as endorser upon the collateral notes; and, although they had been at one time delivered up to the defendant, yet their return to the bank, under the circumstances shown, revived the original liability of the defendant as endorser, and the bank was therefore entitled to recover. BRADY, J., *dissenting*.

APPEAL from a judgment of the general term of the Marine

Court. The action was brought against the defendant as endorser of a note for $200, made by one James Pelton.

It appeared that Jacob D. Mills, a brother of the defendant, applied to the plaintiffs for a loan of $500. The president of the plaintiffs told him to get the defendant's name as collateral, and the bank would make the loan. Jacob D. Mills thereupon applied to his brother, the defendant, who gave him the note in suit, endorsing it, together with two others, amounting in all to $400; and also gave him his own note for $100, thus making up the $500 applied for. The bank made the loan to Jacob D. Mills, upon call, receiving the four notes as collateral security for its repayment.

Jacob D. Mills was a depositor with the bank, and, during the time he had the loan, continued to make deposits. On June 2d, 1855, he called at the bank, having then on deposit about $406, when the cashier informed him that the loan had been charged to him, and directed one of the clerks to give him up the collaterals. The cashier testified that they were given up on the promise, by Jacob D. Mills, to raise the money and pay the loan The collaterals thus given up to Jacob D. Mills were by him returned to the defendant. A few days after this occurrence, however, the cashier requested Jacob D. Mills to return to the bank the notes so previously given up to him. Upon his application to the defendant for them, they were again delivered to him, the defendant saying, at the time, that he might take them back to place matters just where they were when the notes were given up to him. The notes were returned accordingly.

The justice rendered judgment in favor of the plaintiffs, which was affirmed by the general term of the Marine Court, and from the judgment of affirmance the defendant appealed to this court.

Chas. B. Hart, for the appellant.

Benj. T. Kissam, for the respondent.

DALY, J.—It appears, by the defendant's own showing, that

when the bank charged the loan on the $500 note against the account of Jacob Mills, that Jacob had not funds in bank sufficient to pay it. Charging it against Jacob's account, therefore, could not operate as a payment of the loan unless the bank so intended. That they did not so intend, is evident from their demanding the return of the securities withdrawn by Jacob Mills, and that the defendant concurred in these views appears by his returning the securities to them. If it could be gathered, from the testimony, that the $406 which Jacob had on deposit, had been applied by the bank on the $500 loan, then the indebtedness on that loan would be reduced to $94, and, as the bank, on the 21st of June, discounted the collaterals for the benefit of Jacob Mills, it might be inferred that they meant to look to him for the $94, and not to rely upon the collaterals as a security for its payment. But, for all that appears in the testimony of Jacob Mills, he may have drawn from the bank all that he had upon deposit. The cashier of the bank swears positively that the $500 note has not been paid, and Jacob Mills does not swear that it has been. The extent of his testimony is that he had $406 on deposit when the note was charged, and it is to be presumed that if he left that sum in the bank, and has not withdrawn it, he would have said so. To rebut the positive statement of the cashier that the loan had not been paid, it was incumbent upon the defendant to have shown, by the testimony of Jacob Mills, that Jacob had never withdrawn the $406, but left it to be applied by the bank towards the payment of the loan. If he had shown this, then the fact that the bank had charged the loan against the account of Jacob, and that they had realized $106.54 upon the collaterals, which together was more than the $500 note, it would have warranted the conclusion that the bank had been paid the loan for which the collaterals were security, and that the defendant was not liable to them upon the note in suit. The subsequent discounting of the collaterals by the bank, for the benefit of Jacob, was a strong circumstance to show that they regarded the $500 note as paid; that, by making a new loan upon them, they no longer held them as security for the former loan; but it

was not enough, in the absence of certain and positive evidence that the $406 had gone to the use of the bank. This the defendant could easily have shown; and, as he did not, the presumption is to be taken against him.

I think the judgment should be affirmed.

INGRAHAM, First Judge, concurred.

BRADY, J., (dissenting).—The cashier of the bank states that the collaterals were delivered to the depositer, Jacob, *in consideration* of a promise by him to raise the money and pay the loan of $500. On his cross-examination, he states that he does not recollect the conversation, nor the substance of it, when the notes were given up. Jacob states that at a time when he had a balance of about $406 in the bank, he called there, and was informed by the cashier that the loan of $500 had been charged to him, and was then and there given the collaterals, and that he returned them to the defendant. Jacob was not asked, on cross-examination, whether he had not received the collaterals on a promise to raise and pay the loan of $500; nor was he interrogated by the plaintiffs at all on that subject. It is therefore clear, on his statement, that no condition was annexed to the delivery of the collaterals, while on the part of the cashier it appears that he has no recollection of the conversation, nor its substance, which took place on that occasion. He is certain, he states, however, that Jacob promised to raise the money, and that this was the consideration of giving the notes up to him. I have no hesitation to say, in reference to that branch of the case, that I consider the testimony of the cashier wholly unsatisfactory and insufficient. It would be a very dangerous precedent to give greater weight to a vague and fragmentary statement of a conversation, than to the positive, distinct statement of a participant therein. It is my opinion, therefore, that the testimony shows conclusively that when the collaterals were given up, the loan had been charged to Jacob, and that the collaterals were handed to him without condition or qualification. This is sustained by the statement of the cashier as to the custom of the bank: "We

charge notes sometimes when we have securities. When we charge a note, and there is money to pay it to the debtor's credit in the bank, we give up the collaterals; but if there is no money, then we hold on to the collaterals. That is our invariable rule." It must be remembered, in this connection, that some days before the loan was charged to the debtor, the bank had called upon him for payment, which he had not made, although he continued to make deposits after the loan. No other conclusion can be reasonably drawn, from the cashier's statement of the rule of the bank, than that, when the debtor to whom a loan has been made, has any funds in the bank, and the loan is charged to his credit, it is an application of such funds to the payment of the loan. It nowhere appears that Jacob objected to such application. The bank never charges the loan when there is *no* money to the debtor's credit, and it follows, as a necessary conclusion, that when they do, there *is* money in the bank, which is, by that act, appropriated. I think, for these reasons, that, as between the defendant and the bank, it is proved that the former was discharged to the amount of $406. It is no answer, in my opinion, to this proposition, that the collaterals were returned. They had accomplished the object of their deposit, and no new agreement was made with the defendant. Jacob told him that he did not want the cashier to think he had done or intended anything wrong in taking the notes away, and wished to restore them with that end in view. The cashier wanted the notes back, and the reason is obvious. There was a balance due of $94 on the loan, and he was in fact entitled to the possession of them until that was paid, and Jacob did not intend to deprive the bank of that right. That would account for his desire that the cashier should not think he intended any wrong.

It does not appear, as a distinct fact, that the balance of $406 was ever drawn from the bank. The defendant was not bound to prove it. That was a burden upon the bank, and the defendant would then have had the right to show the circumstances under which the payment was made. It certainly cannot preju-

dice the defendant's rights, that he did not prove a material fact which might operate against him, when he put upon the stand a witness who could have stated it on cross-examination. If charging the loan was not an idle ceremony, then the defendant had no right to check against his balance. If it was, then the bank violated an invariable rule, and must take the consequences. I do not think this case differs, in principle, from the case of *The Bank of Salina* v. *Babcock* (21 Wend. 499,) where the bank system of charging against deposits is considered and passed upon in reference to the facts there developed. I think the judgment is wrong, and should be reversed.

Judgment affirmed.

There was also a suit brought in this court [illegible] previous, by the bank, against John T. Mill[illegible]100 made by Mills, and which was the fou[illegible]iven by Jacob D. on procuring the loan al[illegible]ction was tried before Judge INGRAHA[illegible]n rendering judgment in favor of the ba[illegible]g opinion:

"Without passing upon the question of veracity between the witness for the defendant and the clerk of the bank, I am of the opinion that the plaintiffs are entitled to recover, because the defendant agreed to return the collateral notes to the bank to be placed in the same situation in which they were when given up by the clerk. The mere fact of charging the amount to the account of Mills did not relieve the collateral security, and the return of the notes to the bank placed them under the same liability that existed when they were given up. It is not shown that the claim was ever discharged, and my conclusion is that the defendant is liable."

The evidence on both trials corresponded substantially, though differing slightly in details. It appeared, in this case, that after the loan had been charged, and the collaterals given up, the bank had paid Jacob D. Mills' check for $400; also, the amount of Ja-

cob D. Mills' deposit on the 2d of June was stated, in the second case, to be $457.77 instead of $406.

On appeal from the judgment of Judge INGRAHAM, it was affirmed by the general term, (December, 1857), the opinion of the court being merely to the effect that the case did not differ essentially from that in the Marine Court, and that the judgment must be affirmed for the reasons assigned for affirming the judgment in the latter cause.

The appellant afterwards moved for a re-hearing, on the ground that there were differences in the evidence adduced on the two trials, which distinguished the cause in this court from the other. When the cases were originally decided, in Dec., 1857, the court was composed of INGRAHAM, First Judge, and DALY and BRADY, Associate Judges. Upon the motion for re argument, the members of the court were DALY, First Judge, and BRADY and HILTON, Associates. The questions therefore were substantially twice determined by the court; and, on the motion, its decision was given in the following opinion:

By the Court, DALY, First Judge.—After carefully reperusing this case, I see nothing that would justify the ordering of a re-argument. The grounds upon which the appeal in the action in the Marine Court were decided, are in my judgment equally applicable to this case. The difference in the facts between the two cases are immaterial. They would not vary the ground upon which our decision was founded. That is, that the return of the notes by the concurrent act of both defendants with the understanding that matters should be placed just where they were when the notes were given up, showed that they had been given up by the clerk of the bank by mistake. That it was shown by the acts and admissions of all parties that the collaterals were to be retained by the bank as security, and, under such circumstances, the charging of the call loan to the account of J. Doremus Mills did not discharge the collaterals.

Motion for re-argument denied, with costs.

EDWARD A. CLARK *v.* LEWIS LYON.

A defendant failing to serve his answer within the time allowed for that purpose, upon excusing his default and showing a good defence, is usually permitted to interpose it upon terms.

Where the answer was prepared and verified, and placed with the clerk of the defendant's attorney for service in season, and, the defendant's attorney having left town, the answer was not served through the forgetfulness of his clerk,

Held, a sufficient excuse to warrant the opening of the default, the judgment and execution being allowed to stand as security.

APPEAL from an order denying a motion to open a default. This was an action upon a promissory note. The defence was a release under the two-thirds Act. An answer setting up this release was drawn and verified in season for service, and was left by the defendant's attorney with his clerk to serve, he himself being called from town. The clerk swore that he called twice at the office of the plaintiff's attorney before 4 o'clock in the afternoon to serve the answer, but found the office closed; and that he thereafter forgot about the case, until reminded of it by the defendant's attorney upon his return to the city, and after the time for answering had expired. The plaintiff's attorney's clerk swore that the office of the plaintiff's attorney was uniformly kept open until 5 o'clock P. M. The motion to open the default was denied, and, the judge who heard the motion having given the necessary certificate, the defendant appealed.

N. P. O'Brien, for the appellant.

J. S. York, for the respondent.

By the Court, HILTON, J.—A defendant, failing to serve his answer within the time allowed for that purpose, upon excusing his neglect and showing a good defence, is usually permitted to interpose it upon such terms as to the court may seem proper, according to the circumstances of the case.

As no special reason exists for depriving the defendant of the benefit of this general practice of the court, the order appealed from should be modified so as to allow him to answer on payment of the costs of the motion to open his default. The judgment, execution, and levy now existing, to stand as security for the payment of any judgment the plaintiff may hereafter recover in this action.

Ordered accordingly.

JOHN SCHENCK *v.* MICHAEL K. WILSON.

W. was part owner and general agent of a steamboat, M. K. W., and, as such agent, received all the moneys earned by it, and paid all its current expenses—the former far exceeding the latter. In an action against W. by S., the captain and another part owner of the boat, upon whose order the expenses were incurred, W interposed a counter claim or set off for payments made by him on account of the current expenses of the boat, but did not produce his entire account, nor the books showing the transactions and earnings of the boat. *Held*, that his claim was properly rejected.

I. It was reasonable to infer, from the concealment of the books containing the entire account, that the payments had been made out of the receipts of the boat which came to the hands of the defendant as general agent of the owners.

II. The payments, having been made on account of the boat and owners, and not for the individual benefit of S., could be recovered only in an action against all the owners jointly, and upon the production of the whole of W.'s accounts as agent of the boat.

APPEAL by defendant from a judgment entered on the report of a referee. The facts are fully stated in the opinion of the court.

Beebe Dean & Donohue, for the appellant.

L. R. Marsh, for the respondent.

By the Court, HILTON, J.—The plaintiff owned one-half, and the defendant one-eighth, of the steamer "M. K. Wilson." At the time she was burnt, their interest or share in her was insured for $3,750. Their claim for insurance was settled with the companies for $3,300, and of which it was at the time agreed that the defendant, who received the money, was to retain $750 for his one-eighth share, and the balance was to be accounted for to the plaintiff, after deducting the amount due defendant for advances made by him for the plaintiff at the time of putting in the boiler and otherwise preparing the boat for towing purposes. After she was burnt, the plaintiff sold to the defendant his interest in the hulk for $550; and it is to recover this sum, and the balance of the insurance money coming to the plaintiff, that this action is brought.

It appears that the boat was used for towing vessels, and the defendant acted as the general agent of her, receiving all the moneys earned, and paying all the current expenses; which the testimony clearly shows the receipts far exceeded. The plaintiff was employed as captain, and as such it was his business to certify to the correctness of the bills rendered against the boat, and in some cases gave orders on the defendant for their payment; of such, when paid, consisted the current expense account kept by the defendant, as agent, and which were deducted or paid by him from the receipts. Upon the trial, the defendant claimed to have several items properly belonging to this current expense account set off against the plaintiff's claim in this action, without producing the entire account, or his books showing the transactions of the boat and her earnings.

Under such circumstances, the referee was justified in disregarding all such items, as it is reasonable to infer, from the concealment of the books containing the entire account, that they had been paid out of the receipts of the boat which came to the hands of the defendant as general agent for the owners. As the item of $30, paid Valentine on account of the boat and owners, was not paid for the individual benefit of the plaintiff, but belonged to the class which the defendant, as agent, had been in the

habit of paying and charging as part of the current expenses, the referee very properly rejected it from his consideration, although its payment was not disputed. The same may be said of many other items proven, but disregarded by the referee as belonging to the same class, and only proper to be considered in an action against all the owners, and upon the production of the whole of the defendant's accounts as agent of the boat.

Upon a careful examination of the whole case, I am of opinion that it fully sustains the finding of the referee, at least so far as it concerns the defendant. If any error has been committed, it would seem to be in favor of the defendant, and not adverse to his interests. But, as the plaintiff does not complain, it must be presumed that this is one of those cases where the referee hearing the oral statements of the witnesses, and having all the parties in interest before him, was far better qualified to determine as to the credibility of the witnesses and the actual state of affairs between the parties litigating, than the court on appeal can possibly be from merely reading the testimony taken at the trial, unaided by the circumstances which attend an oral examination.

As no reason appears for interfering with the finding of the referee, the judgment must be affirmed.

Judgment affirmed.

MICHAEL JOYCE *v.* WILLARD R. HOLBROOK AND C. W. ANDREWS.

An application in supplementary proceedings for an order requiring the judgment debtor to apply property or money, disclosed by his examination, to the payment of the judgment, is addressed to the discretion of the judge before whom the proceeding is pending.

So also is an application to commit for contempt for disobedience of the order supplementary to the execution.

No appeal lies from an order denying such applications.

Joyce v. Holbrook.

The proceeding to compel the debtor to apply specific money or property to the satisfaction of the judgment is a summary one, and whenever a doubt exists as to the possession and ownership of either the property or money, the creditor should be left to enforce his remedy through a receiver, or by levy under execution.

APPEAL by plaintiff from two orders in proceedings supplementary to execution. The defendant Holbrook having been examined in supplementary proceedings before Judge HILTON, an application was made, at the close of the examination, for an order directing the application of certain moneys alleged to be in bank to his credit, and also for an order punishing him for contempt for an alleged disobedience of the injunction contained in the order supplementary to execution. Both motions were denied, and the plaintiff appealed.

John O'Rourke, for the appellant.

Ward & Doolittle, for the respondents.

By the Court, BRADY, J.—The plaintiff, assuming that the defendant Holbrook, on examination upon proceedings supplementary to execution, had disclosed that he had money and property in his hands belonging to himself, and that he had violated the order supplementary by disposing thereof, applied to Judge HILTON for orders to compel the application of such money and property towards the satisfaction of the judgment, and for an attachment to punish the contempt committed by disobedience to the order supplementary, as above stated. Judge HILTON denied both applications. The plaintiff appeals. The answer to both appeals is the same, namely, that the order directing the application of property and money to the payment of a judgment, and punish for contempt, are entirely discretionary. Sections 297 and 302 provide that the judge may order the application, and may punish for contempt; and, although there are statutes in which the word "may" is to be construed as "must," this is not one. A large degree of discretion must be exercised on all applications to require the appropriation of money and prop-

erty by a judgment debtor, and there are many instances in which that discretion would be oppressively employed if the debtor were compelled to surrender property or money which seemed not to be exempt from execution. The proceeding is a summary one, and, wherever a doubt exists of the possession and ownership of either property or money, the creditor should enforce his remedy through the receiver, or by levy under execution. Whether the creditor should be left to take this course, is one of the considerations to be entertained in determining whether the application should be granted, with a multitude of others, which vary in each case both in number and importance. And so, in regard to punishing for contempt, the right, as a matter of discretion, to refuse to inflict the punishment cannot be well doubted, nor can there be any difference of opinion upon the impropriety of reviewing a discretion exercised in such a manner. This view renders it unnecessary to consider the appeals upon the merits; but, were it otherwise, it could be demonstrated that the discretion was justly exercised.

Appeals dismissed, with costs.

JOHN STEELYARDS *v.* ISAAC M. SINGER AND ANOTHER.

The defendants agreed to sell a sewing machine to Strauss for $150, $50 being paid in cash, and the balance to be paid in monthly instalments, it being agreed that the sewing machine should continue the property of the defendants until fully paid for, and that, if not paid for, the defendants might retake possession of it, and in such case the partial payments made thereon to be forfeited. *Held*,

I. That, as between the defendants and Strauss, the title to the machine did not vest in the latter until he had paid the price agreed upon.

II. But that the agreement did not affect a *bona fide* purchaser of the article, without notice of the conditions upon which its possession was acquired from the owner.

Sewing machines having become an ordinary household chattel, in respect to which the only *indicia* of ownership is in most cases the being in possession, where such possession has been acquired from the owner by his voluntary act, and without

fraud, a purchaser in good faith, and for a fair consideration, from a party deriving possession from the vendor, without notice of the conditions of the original delivery, acquires a valid title, and is to be protected even as against the original owner.

APPEAL by defendants from a judgment of the Second District Court. The facts are fully stated in the opinion of the court.

Ambrose L. Jordan and *William A. Hardenbrook*, for the appellant.

Charles E. Birdsall, for the respondents.

By the Court, HILTON, J.—The plaintiff sues to recover the value of a sewing machine made by the defendants, and which he alleges they wrongfully detained from him and converted to their own use.

It appears that the machine was, on March 14th, 1856, delivered by the defendants to one Isaac Strauss, under an executory contract of sale, the condition of which was that he was to pay for it $150. Fifty dollars was paid at the time of delivery, and the residue was to be paid in monthly instalments of $15 each. The writing signed by Strauss, containing these conditions, commences as follows: "Special agreement *for lien* on patent sewing machine until payments for same shall be completed," and, in the body of it, "it is expressly agreed that the said sewing machine shall remain and continue to be the property of said I. M. Singer & Co. until the same shall be fully paid for according to the terms above mentioned; and if not so paid for, then that I. M. Singer & Co., or their agents, shall have the right to retake the possession of said machine, and partial payments thereon be forfeited."

The proof shows that the plaintiff purchased and acquired possession of the machine in October, 1856, from a Mr. Schultz living in Reade street in this city, his attention having been previously called to it by an advertisement in a German newspaper announcing it for sale. The price paid by him was $110 in cash,

and it does not appear that he had any knowledge of the agreement of Strauss, or knew anything of the claim of the defendants under it until December, 1857, when, the machine becoming out of order, he took it to the store of the defendants to be repaired, who, after obtaining possession of it for this purpose, refused to deliver it unless the plaintiff paid the amount due under the agreement with Strauss. It does not appear when or how Schultz got the machine, nor that the defendants made any efforts to recover it until the plaintiff left it with them to be repaired. The justice having given judgment for the plaintiff for the value of the machine, the defendants appeal, and, on the argument, insist that, as the title to it never passed from them, they had a right to take it wherever they could find it.

There can be no doubt that, as between the defendants and Strauss, under the express contract made at the time the machine was delivered, the title did not vest in him until he had paid the price agreed upon, (*Herring* v. *Hoppock*, 15 N. Y. Rep. 409); but this would in no manner affect a *bona fide* purchaser of the article without notice of the condition upon which its possession was originally acquired from the owner, especially when such possession was, as in this case, obtained under an agreement to purchase, entered into without fraud, and upon which a part of the purchase price had been paid. *Mowry* v. *Walsh*, 8 Cowen, 238; *Saltus* v. *Everitt*, 20 Wend. 267; *Keeler* v. *Field*, 1 Paige, 312; *Haggerty* v. *Palmer*, 6 John. Ch. Rep. 437.

The machine in question, and others of a similar nature, have now become an ordinary household chattel, in respect to which the only *indicia* of ownership is, in most cases, the being in possession; and when that possession has been acquired from the owner voluntarily, and in the manner shown in this case, a purchaser in good faith from a party deriving possession from the vender, for a fair consideration, without notice of the condition of the original delivery, acquires a valid title, and is to be protected even as against the owner. 2 Black. Com. 449; 2 Kent's Com. 497; *Hussey* v. *Thornton*, 4 Mass. 405; *Smith* v. *Lynes*, 1 Selden, 41, 48; *Herring* v. *Hoppock*, *supra*.

The plaintiff, appearing to be such a purchaser, has got a valid title to the machine, and the judgment of the justice for its value should be affirmed.

Judgment affirmed.

CHARLES JACKSON, by his Guardian, &c. *v.* JOHN ORSER, Sheriff, &c.

In an action against the sheriff for an escape, the proof was that J. G. W., the defendant in the execution, was, in January, 1854, captain of the ship Hudson, and that one W., acting as captain of that ship, went beyond the jail limits in March following. *Held*, that the similarity of surname and of office was sufficient *prima facie* evidence to sustain the action, although the witness to the escape could not identify W. as the defendant in the execution, and did not know his christian name.

The plaintiff having made out a *prima facie* case, and there being no evidence in rebuttal, *held*, error to charge the jury that the plaintiff was bound to produce clear and positive proof, and if there was any doubt the presumption should be against the plaintiff.

What is sufficient proof of identity, considered; and the cases upon this subject collected and examined.

APPEAL, by defendant, from an order granting a new trial. This was an action against the defendant as sheriff of the city of New York, to recover damages for an alleged escape of a prisoner. The complaint alleged the recovery of a judgment by the plaintiff against one Joseph G. White, the issuing of an execution against property thereon and its return unsatisfied, the issuing of an execution against the person of Joseph G. White, his arrest by the defendant (the sheriff) under such execution, and his subsequent escape. The cause was tried before Judge DALY and a jury. The plaintiff proved that Joseph G. White was captain of the ship Hudson in January, 1854, when the judg-

nt against him was recovered, and then called a witness, who tified that, on the 19th day of March, 1854, he went on the eamboat Hector, which took out the ship Hudson from the port f New York, about three miles beyond Sandy Hook; that they vent outside and beyond a line drawn from Red Hook to the Jersey shore, including Nutten Island, Bedlow's Island, and Bucking Island; that they went out to sea, two or three miles beyond that line; when the tow-boat was towing out the ship, he heard the captain of the tow-boat call to a person on board of the ship, who answered to the name of Captain White, and he replied to that address; when the steamboat left, the person so addressed gave the second officer of the ship directions as to what sails to let loose; the witness had never seen the man they called captain before; he saw him from a quarter past 6 o'clock until after dinner; as the captain of the tow-boat was leaving the ship, he said "Good-by, Captain White;" the person so addressed acted as captain of the ship Hudson, and gave orders to the second mate, and those orders were obeyed; the same man continued on board the ship Hudson until the steamboat left her, and then remained on board the same vessel.

This was all the evidence offered to prove an escape. The defendant offered no affirmative evidence; but moved for a nonsuit, which was denied, and the cause was submitted to the jury by the judge, with the instruction that it was for them to decide upon the evidence whether the captain of the ship Hudson, who went to sea and beyond the limits, was Joseph G. White, the defendan in the execution. Defendant's counsel then requested the judg to charge, that this was an action in which the plaintiff was bour to produce clear and positive proof; and if there was any doul the presumption would be against the plaintiff; to which t judge assented, and so charged, and the plaintiff's counsel cepted thereto.

The jury having found for the defendant, the plaintiff m before the same judge for a new trial, which was granted. defendant appealed.

Brown, Hall & Vanderpoel, for the appellants.

I. The judge at trial should have non-suited, because there was no evidence of *the* person under bail having escaped; and, had the jury found for plaintiff, the court, under the evidence, should have awarded defendant a new trial. To sustain an action for an escape against the sheriff, it must be shown affirmatively, and by plain and irresistable evidence, that the defendant in the execution has been off the limits. *Vischer* v. *Gansevoort*, 19 Johns. R. 496.

II. Where a person is sought to be identified by the circumstance of similarity of name, it must at least be by similarity of the entire name. *Jackson* v. *Goes*, 13 Johns. R. 528; *Nelson* v. *Whitehall*, 1 Barn. & Adol. 21. Suppose a subscribing witness were to swear, "I saw the instrument executed by a person who was called into the room, but I do not know that that person was the defendant"—the plaintiff would be non-suited, yet in that case the person would respond to the name and act under it. *Whitelock* v. *Musgrove* (per BAILEY, J.,) 1 Cromp. & Mee. 511; *Parkins* v. *Hawkshaw*, 2 Stark, 212; *Middleton* v. *Sanford*, 4 Camp. R. 34; *Brown* v. *Kimball*, 25 W. 274; *Nelson* v. *Whitehall*, 2 Barn. & Adol. 19.

III. There was no necessity for a charge from the judge. But the judge's charge could not have misled. He charged, in substance, as favorably as the plaintiff could have desired. See *Asby* v. *Repelye*, 1 Hill, 11. (*a*) In *Ross* v. *Gould* (5 Greenlf, 20–4,) the genuineness of a deed was controverted, and the plaintiff was held "to satisfy the jury, beyond a reasonable doubt, that it is genuine." (*b*) The language of DALY, J., at trial, is substantially that of Lord ABINGER in *Long* v. *Hitchcock*, 9 C. & P. 619; see, also, *Sumner* v. *State*, 5 Black. 579; *Lexington Fire Co.* v. *Paver*, 16 Ohio, 324. (*c*) And doubt may spring from a plaintiff's case, as well as from a whole case of testimony.

Benjamin G. Hitchings, for the respondent.

I. There was sufficient *prima facie* evidence of identity, and, no evidence whatever having been given to rebut it, the plaintiff

was entitled to recover. Identity of name is always sufficient *prima facie* evidence of identity, and no further proof is ever required until contrary evidence is produced. *Jackson* v. *King*, 5 Cow. R. 237. The evidence in this case is much stronger than mere identity of christian and surname. We have at each of the two periods not only Captain White, but Captain White, captain of the same ship Hudson. That the same Captain White continued to be captain of the ship Hudson, is a presumption of law. 1 Cow. & Hill's Notes, 205; 9 Wend. 351; 4 Wend. 429. The facility of explanation and contradiction is always to be regarded in judging of the sufficiency or weight of testimony. If the Captain White, who left the limits and went to sea on the 19th of March as captain of the ship Hudson, was not actually the person who had, four days previously, been arrested and given bail for the limits, how easy for defendant to have proved it. The owners of the ship, or Captain White himself could have proved it. "Imperfect proofs become perfectly strong and convincing when uncontradicted, if the party to be charged is supposed to have the power of contradicting if the facts were not as charged." 1 Phil. Ev. 157; 3 Stark. Ev. 487; 2 Cow. & Hill's Notes, 310.

II. The judge should have directed a verdict for the plaintiff, as requested by plaintiff's counsel, or should have charged the jury that the evidence of identity was *prima facie* sufficient, and that, no evidence having been given to rebut it, the plaintiff ought to recover upon it. *Prima facie* evidence is sufficient until contradicted, or repelled by contrary proof, and a jury have no right to disregard it, or find against it. STORY, J., in *Rilly* v. *Jackson*, 6 Peters, 682; 7 Wend. 160; 5 Wend. 257.

III. The proposition in the charge, "that this was an action in which the plaintiff was bound to produce clear and positive proof, and if there was any doubt the presumption would be against the plaintiff," was clearly erroneous, and the judge was right in granting a new trial on that ground. There was no hardship about the action, the sheriff being fully indemnified by bail of his own approval, and no ground whatever for the appli-

cation of any different rule of evidence from what prevails in other civil suits. The courts, so far from holding that any peculiar strictness of proof in favor of the sheriff in this action, as required, have in general held quite the contrary, for instance: The slightest departure from the liberties is sufficient. 2 Duer's R. 404; 5 Johns. R. 89. It is sufficient *prima facie* evidence of an escape that the prisoner is seen at large in the street, and throws upon the defendant the burden of proving that the place was within the limits. *Steward* v. *Kipp*, 7 Johns. R. 165. A return cannot be given in evidence under the general issue, but must be pleaded specially. 1 Chitty's Pl. 535. If the limits are in any part vague and indefinite, or ill defined, the prisoner is bound, at his peril, to keep within places clearly defined. *Kipp* v. *Bridgham*, 7 Johns. R. 168. By statute, in England, it is conclusive evidence of an escape if the jailer does not show the prisoner when called upon to do so. 4 Cow. & Hill's Notes, 399.

IV. Justice requires that there should be a new trial. If the evidence had been held to be insufficient on the motion for a nonsuit, plaintiff would have had an opportunity to produce more; but the verdict for the defendant was rendered upon evidence adjudged *prima facie* sufficient for the plaintiff. If the verdict stands: 1*st*. The judgment in this action against the plaintiff is a bar to any action for the escape in question. 2*d*. The original judgment, and all remedy on it, is gone. The arrest of a defendant on a *capias ad satisfaciendum*, is a satisfaction of the judgment and debt. 2 Tidd's Pr. 943; Graham's Pr. 421; 1 Cow. R. 56; 8 T. R. 123. It cannot even be proved in bankruptcy, or made the ground of a set-off. If the prisoner escapes, plaintiff has his election either to issue a new execution or to sue the sheriff. But a suit against the sheriff is an election on the part of the plaintiff to consider him out of custody; and, if he sues the sheriff, he cannot arrest the defendant again on the same or any new execution, and that suit is a bar against any subsequent action for an escape. *Brown* v. *Littlefield*, 11 Wend. 467.

A new trial will be granted where, upon the whole, there is great reason to believe that justice has not been done; (*Jackson*

v. *Steenburgh*, 1 Caines, 163); and a non-suit set aside, even when properly granted, as otherwise the cause of action would be lost. *The People* v. *Barnes*, 12 Wend. 492. Even if there is no error of law, a new trial will be granted "where there is a reasonable doubt, or perhaps a certainty, that justice has not been done." Lord MANSFIELD in *Bright* v. *Crisp*, 1 Burr, 390, 395.

By the Court, BRADY, J.—The proof in this case was that Joseph G. White was the captain of the ship Hudson. That the ship was towed out to sea on or about the 19th of March, 1854. That a person on board the ship was addressed by the captain of the towboat as Captain White. That the person so addressed replied to such address, and also gave orders to the second officer on board the ship as to what sails to let loose. And further, that as the captain of the towboat was leaving the ship, he said "Good by, Captain White;" and that the person so addressed acted as captain of the ship. This testimony was *prima facie* sufficient to show that Joseph G. White went out as captain of the ship Hudson, and to throw the burden of proof to the contrary on the defendant. In *Nelson* v. *Whittall* (1 Barn. & Ald. 19,) it was held, in an action on a promissory note, that proof of the handwriting of a subscribing witness thereto, who was dead,—it having been shown that the defendant was present in the room when the note was prepared by the subscribing witness,—was sufficient, without proving the handwriting of the defendant. In *Sewell* v. *Evans* (4 Ald. & El., N. S. 1843, 626,) the action was on a bill of exchange drawn upon and accepted by the defendant in payment for goods sold and delivered. A witness stated that he introduced a person of the name of the defendant to the plaintiff's testator as a customer, and that he saw the person so introduced write a letter. The letter was produced in evidence, and, as was admitted, established the case against the defendant by acknowledgment, *if the identity* of the writer and the defendant was shown. The facts occurred five years before the action was brought. The witness had not seen the person since, and *and did not know whether that person was the defendant.* In *Roden* v. *Ryde* (Id.

629), which was an action against the defendant as acceptor of three bills of exchange, it appeared on the trial that all the bills were accepted in the name of Henry Thomas Ryde, and made payable at the Regent street branch of the London and Westminister Bank. The cashier of the Bank stated that he knew the handwriting of Henry Thomas Ryde, and that the acceptances were in his writing. Being cross-examined, he stated that Henry Thomas Ryde had kept an account at the Regent street branch; that he had *never seen him write, and did not know him;* that his only means of knowledge as to his handwriting consisted in his having, as cashier, paid checks drawn in the name of the party alluded to by him; and that he had paid none for some time. For the defendant it was objected that there appeared no evidence to identify him with the Henry Thomas Ryde spoken of by the witness. The judge (WILLIAMS) thought there was a *prima facie* case of identity, and overruled the objection. On rules *nisi* in both these cases, the court held the proof sufficient. Lord DENMAN, at page 633, says: "But, in cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn." WILLIAMS, J., at page 634, says: "A man of the defendant's name had kept money at the branch bank, and this acceptance is proved to be his writing. Then, is that man the defendant? That it is a person of the same name *is some evidence*, till another party is pointed out who might have been the acceptor."

Applying these cases to the one in hand, the facts that the defendant in the execution was theretofore the captain of the ship Hudson, and that a Captain White was commanding the ship Hudson when she went to sea, were at least some evidence that the person so commanding was the defendant in the execution, "till another person was pointed out." The natural presumption, arising from the facts, is that Joseph G. White went to sea in the ship Hudson, and it seems to be very clear that the error in the charge, for which the presiding judge ordered a new trial, was one which materially affected the plaintiff's recovery, and

entitled him to a new trial. In *Long* v. *Hitchcock*, (9 C. & P. 619), to which we were referred on the argument, and which was an action for *crim. con.*, Lord ABINGER charged the jury "that the plaintiff was to prove his case to their satisfaction. That if he left it doubtful, either from the circumstances which surrounded it, or from the character of his witness, they could not say that he had made it out." The peculiar circumstances of that case warranted the language used. The only witness called to prove the adultery had been convicted of felony, and had been several times in prison charged with various offences; and, on cross-examination, would not swear that he had not stated that his statement was false. But the jury were not told that the plaintiff was bound to produce clear and positive proof.

The testimony in this case, having been *prima facie* sufficient, should have been submitted to the jury for their consideration. Whether it was sufficient to prove the departure of Joseph G. White, the defendant in the execution, was for their determination.

Order of special term affirmed, with costs.

DANIEL BIDWELL *v.* WILLIAM M. WEEKS.

A plaintiff in a district court has a right to discontinue his action at any time before the cause is finally submitted.

And it makes no difference that the defendant has interposed a counter claim, and seeks affirmative relief.

In an action for work, labor, and services, the defendant answered that the work was done under a special contract, and averred a breach of the contract, and claimed damages therefor. Pending the trial, the plaintiff asked leave to withdraw the action, and that a judgment of non-suit be entered against him. The justice refused the application, and rendered judgment for the defendant for the damages claimed.

Held, error. It was the duty of the justice to have dismissed the complaint with costs, and without prejudice to a new action.

APPEAL by plaintiff from a judgment of the First District Court. The facts are fully stated in the opinion of the court.

Capron & Lake, for the appellant.

Carpentier & Beach, for the respondent.

By the Court, HILTON, J.—The plaintiff sued to recover for work and labor in painting certain roofs of buildings belonging to the defendant. The answer set up that the work was performed under an express contract, by which the plaintiff warranted that the painting would make the roofs water-tight; that it did not produce that effect; and the defendant claimed damages for the non-fulfilment of the contract. On the trial, evidence was introduced by both sides; but, before the case was finally submitted, the plaintiff stated that he should withdraw the action, and asked that a judgment of non-suit be entered against him. The justice refused, and subsequently gave judgment in favor of the defendant for the damages claimed.

In this the justice clearly erred. The plaintiff, at any time before the action was finally submitted, had a right to discontinue it; and, in such a case, it was the duty of the justice to give judgment dismissing the action with costs, and without prejudice to a new action. See *District Court Act*, 1 Laws 1857, p. 707, § 45; *Gale* v. *Hoysradt*, 7 Hill, 179; *Norris* v. *Bleakley*, 3 Abbott P. R. 107.

Judgment reversed.

EDWARD H. LUDLOW *v.* RICHARD F. CARMAN.

C., the owner of a house, put it into the hands of both G. & L., brokers, for sale, agreeing to give a commission to whichever of them sold it. One F. was introduced to C. through the intervention of G., and looked at the house; but nothing resulted from the interview. L. afterwards brought F. and C. together, and nego-

tiations were continued between them some time; C. finally made an offer of sale, which F. refused to accept; the negotiations were given up, and L. himself gave up attempting to effect a bargain between them. Through the intervention of G., however, they were brought together again, and a sale was finally effected upon the same terms which F. had previously declined to accede to.

Held, that L. was not entitled to commissions as broker.

If a broker finds a purchaser and puts him in communication with the seller, and the parties think proper to take the matter out of his hands and carry on the negotiation themselves, the broker earns his commissions if a sale is afterwards effected.

But in this case L. could not be said to have found the purchaser. He merely brought parties together who had been together already.

Nor did he effect a sale. The sale was effected through the efforts of G., after the negotiations had been abandoned by L., and G. alone was entitled to commissions.

Per HILTON, J., *dissenting*.—The facts proved were sufficient to make out a *prima facie* case, and enough to entitle the plaintiff to recover. And the finding of the justice in favor of the plaintiff L., not being so clearly against evidence as to warrant the presumption of bias, passion, partiality, or obvious misapprehension or mistake, the judgment should be affirmed.

APPEAL by defendant from a judgment of the Marine Court. The action was brought to recover the sum of $300, broker's commissions on the sale of a house belonging to the defendant. The only question in the case was whether the sale was effected through the plaintiff, or through one Glentworth, another broker. Judgment was given for the plaintiff for the full amount claimed, which was affirmed by the general term of the Marine Court. The defendant appealed. The facts in the case are fully stated in the opinion of Judge DALY.

C. J. & E. De Witt, for the appellant.

G. P. Andrews, for the respondent.

BRADY, J.—I think the testimony shows that, although the plaintiff was employed to sell, and introduced the buyer, the purchase was abandoned, and subsequently induced by Glentworth. I do not consider this a case of conflict of evidence, but a clear misapprehension or plain mistake on the part of the jus-

tice. If the evidence established the facts that the plaintiff introduced the buyer, and that the buyer so introduced, without any intervening agency, made the purchase, it would be otherwise, even though a period should have elapsed between the introduction and the purchase, and the negotiations for a time should not have resulted in a sale. Here, as already suggested, the buyer abandoned the contemplated purchase, but finally completed it through the instrumentality of Glentworth. There is no evidence to show that, after the interviews between the defendant and the purchaser, consequent upon the introduction of the latter, but which resulted in nothing, the plaintiff ever did anything towards the sale or a renewal of the negotiations. Indeed, it appears that he did not know that the sale had eventually been made to the person introduced by him, until it was consummated. The case, therefore, on the part of the plaintiff, is a mere introduction of a person desirous to buy, but unwilling to comply with the terms of sale, and declining to purchase for that reason. Although the buyer was introduced by the plaintiff, the sale to him was effected by Glentworth. I think the judgment should be reversed.

DALY, First Judge.—There was no conflicting testimony in this case. That is, there was no contradiction as to the material facts, for Ludlow's impressions, or what he supposed, could not alter or affect the facts positively sworn to by the witnesses Carman, Fellows, and Glentworth, and the most material facts consisted of what occurred in the presence of Ludlow—such as the declaration of Fellows that he had given the matter up, and Ludlow's statement to Carman that there was no use of any further negotiations with Fellows, which Ludlow did not deny, or attempt to qualify or question.

The facts, as they stand uncontradicted upon the evidence, are as follows: The defendant Carman had employed Glentworth to sell the house, and Glentworth's cards or bills, directing inquiries to be made of him, had been on the house for three or four months. While Glentworth's bills were up, the carpenter of Fellows called upon him, Glentworth knowing that he represented Fellows, and

obtained a list of houses which Glentworth had for sale, among which was the house in question; and it was from his carpenter that Fellows first learned that the house was in the market. Carman called upon Ludlow to get him to sell the house, but Ludlow refused to act while Glentworth's bills were on it, and Carman agreed to put up a bill directing inquiries to be made of himself, which was done with the understanding that Ludlow might offer the property for sale as well as any other broker, Carman declaring that he would give a commission to whoever sold it. Fellows, having learned from his carpenter that the house was for sale, obtained Carman's address from the bill on it, and called at Carman's office. He saw Carman, learned from him the price, and Carman went and showed him the house; but nothing resulted from the interview. This took place before Ludlow applied to Fellows as the agent or broker of Carman. Ludlow then sent for Fellows, and an interview took place between him and Carman at Ludlow's office. Ludlow testifies that he introduced them, and that he supposed, from the way in which they acted, that they were strangers. Fellows, however, testifies that he mentioned to Ludlow that he had seen Mr. Carman's house, and that Ludlow then told him that he had the selling of it. Here, then, is perhaps some conflict, but if there is, it is not material, as Ludlow's testimony, giving it its full scope and extent, is merely as to his impressions, which could not be received to contradict a fact positively sworn to by both Carman and Fellows; indeed, as mere matter of impression, it was no evidence at all, for he did not state how they acted, or what they said, to give him such an impression. Two interviews occurred between Fellows and Carman at Ludlow's office, but they could not come to terms. Carman's price was $30,000. Fellows wanted certain repairs made. Carman considered that they would cost five or six hundred dollars, as he told Ludlow, and offered to throw off $500, which was communicated by Ludlow to Fellows, but Fellows considered the reduction too trifling, and would not buy except at $30,000, Carman agreeing to make the repairs. At this point of difference the parties stood. Ludlow tried to persuade

Fellows to buy at Carman's offer, telling him that the property was cheap, but did not succeed in inducing him, and Carman would not sell upon Fellows' terms. Fellows then, as he testifies, abandoned all hope of making the purchase. At the last interview between him and Carman at Ludlow's office, he told Carman and Ludlow that he had given the matter up, and was going to look elsewhere; and Ludlow told Carman that there was no use of any further negotiations with Fellows; and so the matter ended as respects Ludlow's efforts or attempts to bring about a sale. If the parties—that is, Carman and Fellows—had come together again of their own motion, and perfected the sale, there would have been some color or ground for holding that Ludlow would have been entitled to a commission. But they did not. They were brought together again by another broker, Glentworth. While Ludlow was trying to negotiate the sale, Fellows was repeatedly at the office of Glentworth respecting the purchase of the house, or of others, or for the renting of a furnished house. After the last interview between Carman and Fellows at Ludlow's office, Glentworth met Carman and brought him to his, Glentworth's, office, where he met Fellows, and negotiations were resumed for the purchase. This negotiation was carried on by Glentworth, and, after two interviews at Glentworth's office, the parties came to terms, the bargain was made, and the contract for the purchase was drawn up and executed in the office of Glentworth.

The question for the justice, upon this uncontradicted state of facts, was, who effected the sale, or earned the commission, Glentworth or Ludlow? They could not both earn it, for, although Carman employed them both, and had a right to employ as many brokers as he thought fit, he had agreed or promised to pay a commission only to the one who effected the sale. This question upon the evidence was a very plain one, and admitted, in my judgment, of but one conclusion. Neither Glentworth nor Ludlow were directly instrumental in bringing Carman and Fellows together on the first interview, but their first meeting was brought about indirectly through information obtained by the carpenter

of Fellows at the office of Glentworth. That interview ended in nothing. Carman and Fellows were then brought together by Ludlow, and several interviews took place at his office, which also ended in nothing. After which they were brought together again by Glentworth, and through him the sale was effected. That is, the sale was the consequence of his action. It is true that, while the matter was in the hands of Ludlow, Fellows offered to buy upon the same terms that Carman subsequently sold; but Carman then declined to accept it, and the matter was given up by Fellews, Ludlow himself declaring that there was no further use in negotiating with him. Ludlow did all that he could to persuade Fellows to accede to Carman's terms, but without effect; and the matter, so far as Ludlow's instrumentality and efforts intervened, was abandoned and given up. Ludlow swore that he considered that the matter was still in his hands, but what he considered is not to be received against the open evidence of his acts—his positive declaration that there was no use in negotiating further with Fellows. While Ludlow was negotiating between the parties, neither Carman nor Fellows attempted to take the matter out of his hands. Fellows considered that he was the person to treat with, and Ludlow did what he could do, but without success. Carman had not employed him exclusively, and Glentworth had a right to take the matter up, and bring the parties to an understanding if he could. All that we have ever said in these cases is that, if the broker finds the purchaser, and puts him in communication with the seller, and the parties think proper to take the matter out of the broker's hands and carry on the negotiations themselves, the broker earns his commission if a sale is afterwards effected. Here, Ludlow cannot be said to have found the purchaser. He merely brought parties together who had been already together. If, after doing this, he had effected a sale; or if they had taken the matter out of his hands and agreed upon the terms of sale, he would, perhaps, have earned his commission. But nothing of the kind took place. He brought them together, and failed to accomplish anything. Another broker did precisely what he had done, and succeeded in

ing what Ludlow had not been able to bring about. I think
rue mode of viewing the case is, as suggested by Judge
Y, that the negotiation instituted by Ludlow was abandoned
iven up by all the parties to it. That a new negotiation
hen set on foot by Glentworth, and, though it resulted in a
pon precisely the same terms as had been offered by Fel-
in the negotiation with Ludlow, that it was nevertheless a
ct and independent transaction, not proceeding or growing
f the previous one, so as to constitute Ludlow the party
gh whose instrumentality the sale was effected. Carman
mployed Glentworth previous to the negotiation with Lud-
That employment still continued, and Carman was justi-
n regarding Glentworth as the party through whose action
le was finally brought about. He has paid Glentworth a
ission of $300, and to sustain this judgment would be to
el him to pay another commission, which would involve,
ng either that he owed Glentworth nothing for his final ser-
in the matter, or was bound to pay a commission to each
r, a conclusion, I think, unwarranted by the evidence, and
, in my judgment, would be most unjust. I therefore agree
Judge BRADY that the judgment should be reversed.

LTON, J. (dissenting.)—The plaintiff sued in the court below
over commissions for his services as broker in effecting a sale
tain real estate belonging to the defendant. On the trial, evi-
was introduced tending to show the employment of the plain-
ie services performed by him in bringing about the sale of the
rty, and their value. The case was submitted to the justice
ut any testimony being offered by the defendant, and a
nent was subsequently rendered for the amount claimed.
lefendant appeals upon the ground that the judgment is
ary to the evidence.

is a sufficient answer to this objection to refer to the
rities, where it has been repeatedly held that the finding
justice upon questions of fact is to be treated in every
t like the verdict of a jury, and, upon appeal, the judgment

will not be reversed upon the ground stated, except in those cases where it is so clear as to warrant the presumption of bias, passion, partiality, or obvious misapprehension or mistake on the part of the justice. *Stryker* v. *Bergen*, 15 Wend. 491; *Noyes* v. *Hewitt*, 18 Id. 141; *Easton* v. *Smith*, 1 E. D. Smith, 318; *Decker* v. *Jaques*, Id. 80; *Needles* v. *Howard*, Id. 54; *Heim* v. *Wolf*, Id. 70; *Mellon* v. *Smith*, 2 Id. 463.

Here, the testimony on the part of the plaintiff amounted, in my opinion, to at least *prima facie* evidence; and such as, in judgment of law, was sufficient to establish the facts which entitled him to recover; and, not being overcome, remained sufficient for the purpose. *Kelly* v. *Jackson*, 6 Peters, 622. It appeared affirmatively that Ludlow was employed to sell the property, and through his instrumentality a purchaser was procured who offered a price which the defendant at first refused, but afterwards concluded to accept. It is true that Glentworth was entitled to the credit of finding the defendant in a different state of mind from that in which the plaintiff left him, but I am not prepared to say that this act was sufficient to justify the payment of the entire commissions to Glentworth, and thus in effect hold that the plaintiff was entitled to nothing. It may have been a proper case for the defendant interpleading Ludlow and Glentworth respecting the commissions, but the proof, in my opinion, is not such as to justify us in saying that no cause of action was shown.

I think, upon the whole case, that the judgment should be affirmed.

Judgment reversed.

Ezekiel C. Hoag *v.* William Wade.

H. sued W. to recover for services rendered. W. interposed a counter claim for money lent. It appeared on the trial that W. had received H.'s note for the amount of the loan, which had been renewed at maturity, and that the renewal note was still in his possession.

Held, that he could not recover, or be allowed his counter claim for the money lent, without producing the note and cancelling it upon the trial. His mere offer to produce it, and to give a bond to protect the plaintiff from any suit or claim based thereon, was not sufficient; nor did his production of the note to the justice, seven days after the trial, aid his claim in any manner—the plaintiff was entitled to have the note produced and cancelled at the trial.

APPEAL by plaintiff from a judgment of the Third District Court. The facts are fully stated in the opinion of the court.

Samuel C. Gerow, for the appellant.

Samuel Williams, for the respondent.

By the Court, HILTON, J.—The plaintiff sued to recover for services rendered. The defendant set up a counter claim for $50, arising from money lent, for which, at the time of the loan, the defendant gave his note, and also a watch, as collateral security. It appears that the plaintiff made application for the loan to the witness Cox, who was in the defendant's employ; and the check for the money was drawn by Cox and signed by the defendant. When the note became due, the plaintiff applied to the defendant to renew it, and he was told that "Cox would do the business." He then went to Cox and gave a renewal note, taking up the one first given.

The defendant was examined at the trial on his own behalf, and, upon being shown the note first given, said, he never to his recollection saw it before; but added "I got a note of $55, which Mr. Cox said Hoag gave him;" and, in a subsequent part of his testimony, stated that the plaintiff "gave Cox the watch, and Cox handed it to me (defendant) to see what it was worth," and "I have not got any note in my hands as security."

From the whole testimony it is manifest that Cox acted throughout the transaction as the agent of the defendant, and the objection of the plaintiff to the allowance of the counter claim, unless the renewal note was produced in court and cancelled on the trial, was well taken. The defendant's offer to procure and surrender

the note, and give a bond to protect the plaintiff from any suit or claim based upon it, did not obviate this objection; and the subsequent production, by the defendant, to the justice, seven days after the trial, of a note of the plaintiff's, did not aid the defence in any manner, or operate so as to deprive the plaintiff of his right to have the note, upon which the counter claim was founded, produced by the defendant on the trial, and cancelled upon the allowance of the counter claim. *Burdick* v. *Green*, 15 John. 247; *Raymond* v. *Merchant*, 3 Cow. 147; *Hughes* v. *Wheeler*, 8 Id. 77.

For these reasons the justice erred in allowing the counter claim; and the judgment in favor of the defendant must be reversed.

Judgment reversed.

ALEXANDER H. NONES *v.* JOSEPH G. HOMER AND AUSTIN W. OTIS.

An agreement, made one week prior to the 1st of August, 1857, to enter the service of another, and continue therein until the 1st of August, 1858, is an agreement which, by its terms, is not to be performed within one year from the making thereof, and, if resting in parol, is void.

But an employer, having derived a benefit by the servant's part performance under such a contract, is liable in an action for the services actually rendered.

And, in the absence of any evidence as to the value of the services, the rate of compensation fixed by the agreement should be regarded as the measure of damages.

APPEAL by defendants from a judgment of the Fourth District Court. This action was brought to recover for services rendered to the defendants, as their clerk, for the months of October, November, and December, 1857. The plaintiff testified that about a week prior to the 1st of August, 1857, he made an agreement with the defendants to enter their employ, as a clerk, at a salary

of $600 per year—the employment to last from the 1st of August, 1857, to 1st August, 1858; that he was paid up to the 1st of October, 1857, and, on the 26th of that month, was discharged, the defendants having failed and made an assignment on that day. Judgment was rendered, on this evidence, against the defendants for the amount claimed, and from this judgment they appealed.

Northrup & Vernon, for the appellants.

I. The evidence shows that the contract on which the plaintiff seeks to recover, was a *parol* agreement made about a week before the 1st of August, 1857, for the services of the plaintiff for one year from and after the said 1st day of August, 1857. It was therefore an agreement which, by its terms, was not to be performed within one year from the making thereof; and is, for this reason, void by the Statute of Frauds. Rev. St., 3d ed., vol. II, pt. 2, tit. 2, chap. 7, § 2, p. 195; *Drummond* v. *Burrill*, 13 Wend. 307; *Lockwood* v. *Barnes*, 3 Hill, 128; *Broadwell* v. *Getman*, 2 Denio, 87.

II. "Although performance is to begin, and does begin, within the year, yet, if the agreement is not to be *completely* executed within that period, it is within the Statute of Frauds." 3 Hill, 128, *supra;* 2 Denio, 87, *supra.*

E. W. Dodge, for the respondent, cited *Young* v. *Dake*, 1 Selden, 463.

By the Court, BRADY, J.—The respondent claimed from the appellants the sum of $150 for three months' services rendered under and by virtue of a contract made with them at the rate of $600 per year. The agreement was by parol, and was for a year's service, namely, from August, 1857, to August, 1858. The respondent remained in the service of the appellants until the 26th of October, 1857, when he was discharged by them. It appears, from the respondent's statement, that the agreement was made *one week preceding the 1st of August*, 1857, but that it was

to *continue* from August, 1857, to August, 1858, and it follows that it was an agreement which, by its terms, was not to be performed within one year from the making thereof, and is void. *Wilson* v. *Martin*, 1 Denio, 602; *Broadwell* v. *Getman*, 2 Denio, 87; *Lockwood* v. *Barnes*, 3 Hill, 128. But the appellants, having derived a benefit by a part performance, must pay for what they have received. *Lockwood* v. *Barnes*, *supra*; *King* v. *Brown*, 2 Hill, 485. And, having agreed as to the amount or rate of compensation, in the absence of proof as to the value of the services rendered, the agreement should be regarded as the measure of damages. See *King* v. *Brown*, *supra*. The respondent was paid up to the 1st of October, 1857, but remained until the 26th of that month. On the principles herein stated, he was only entitled to recover for twenty-six days service, at the rate of $600 a year, which amounted to $42.12. The judgment must therefore be reduced to, and affirmed for, that sum, and reversed as to the excess.

Ordered accordingly.

EDWARD WARBURG *v.* LESTER WILCOX AND OTHERS.

To enable a debtor to avail himself of a composition agreement with his creditor, extending the time of payment of the debt sued upon, it is necessary for him to show that he has been ready at all times to perform his part of the contract.

Where it appears that the creditor has agreed to exchange the debtor's notes, held by him, for new notes to be drawn by the debtor according to the extension agreed upon, it is necessary for the defendant to aver and prove a tender of the new notes, and show a readiness at all times to perform the agreement on his part; and he must bring the new notes, thus tendered, into court at the time of the trial.

Mere willingness, in such a case, on the part of the debtor, to give the new notes, is not sufficient. They must be drawn up and tendered.

APPEAL by defendants from a judgment of the Marine Court. This was an action upon a promissory note, made by the defend

nts, payable to the order of Edward Warburg & Co., and owned by the plaintiff. On the trial, the plaintiff admitted that he held it subject to any defence which the defendants might have against the payees, Warburg & Co. To sustain their defence, which was founded upon a composition agreement by the payees of the note extending the time of payment, the defendants offered in evidence the following agreement, signed by various creditors of their's, and, among others, by Warburg & Co:

"We, the undersigned, creditors of Wilcox, Perry & Co., in consideration of their inability to pay their indebtedness at maturity, and of one dollar to each of us in hand paid, do severally agree to, and do hereby grant the said Wilcox, Perry & Co., an extension, upon all paper or demands now held by us, or either of us, against said firm, of 9, 12, 15, 18 and 21 months from the first day of October instant, or an extension that shall be equivalent to that, the several payments being fixed to suit the different parties, so that the average time shall not be less than above, interest from the maturity of all demands to be added. And we do severally agree to take up any and all paper of said firm endorsed by us, and passed out of our hands, and exchange the same for new paper of said firm, to be made according to the extension above provided for.

"Witness our hands and seals, this 12th day of October, 1857."

There was no proof that the defendants had ever tendered to Warburg & Co. the extension notes referred to in the agreement. It appeared, by the testimony of one of the defendants, that they offered to give them, but that Warburg & Co. declined to receive them; but, on cross-examination, he testified that the notes were not drawn at the time the offer was made. Judgment was rendered for the plaintiff, which was affirmed at the general term of the Marine Court. The defendants appealed.

W. Z. Larned, for the appellants, contended that, by the terms of the agreement, the time of payment of the notes in suit was

absolutely and unconditionally extended; and cited *Allen* v. *Jaquish*, 21 Wend. 628; *Eddy* v. *Graves*, 23 Wend. 82.

C. Bainbridge Smith, for the respondent.

I. The answers of the defendants set up no valid defence to the notes on which these actions are brought. The answers are insufficient; they do not allege either a tender of the renewed notes, or a readiness on the part of the defendants to give them.

1. Even where a tender has been made, it is necessary to plead it. 1 Chitty on Pl. 479.

2. So, where a debtor tenders his creditors securities for the payment of his debt in consideration of having time for payment, "the defendant must not only plead that he has always been, and still is, ready with the money, or thing tendered, but it must also be in court on the trial." *Brooklyn Bank* v. *Degraw*, 23 Wend. 342, 345, and cases cited.

3. The reason is, that the creditor is entitled, at all events, to the thing tendered. Id; 2 Kent's Comm. 509.

4. All the cases hold, that if the terms of the composition agreement be not exactly followed out by at least a tender of the substituted securities at the very day, the creditor is remitted to his original rights, and the *onus* lies with the defendant to prove such performance. *Fellows* v. *Stevens*, 24 Wend. 302; *Oughton* v. *Trotter*, 2 Nev. & W. 71; *Dolson* v. *Arnold*, 10 How. Pr. 530; *Rosling* v. *Muggeridge*, 16 M. & W. 181.

5. And where no time is set for the debtor to give the substituted securities, they must be tendered within a reasonable time. Id. The composition deed was signed by the plaintiff, between the 12th and 20th of October, 1857; and, although some of the creditors had received their substituted notes before the commencement of this action, none were ever tendered to the plaintiff.

HILTON, J.—This action is upon a promissory note made by the defendants to their own order, and transferred to the plaintiff. The defence was that the plaintiff, with other creditors of the defendants, had signed a composition deed, whereby it was agreed

that the time for payment, on all the notes held by the parties signing, should be extended 9, 12, 15, 18 and 21 months, and that this time, or any part thereof, had not expired. On the trial, the composition deed was put in evidence, and from which, aided by the testimony of the defendant Wilcox respecting his action under it, it sufficiently appears that the creditors signing agreed to exchange the paper then held by them of the defendants, for new notes, to be drawn by the defendants according to the extension so agreed on.

The agreement being somewhat obscure as to the manner in which the extension was to be effected, we are permitted to construe its language by referring to the acts of the defendants under it; and these, as already remarked, clearly show that the nature of the compromise the parties intended to make, was as stated.

To enable the defendants, therefore, to avail themselves of any defence to this action arising out of the agreement, it was necessary for them not only to plead and prove tender of the new notes which were to be so exchanged, but also aver readiness at all times to perform their part of the contract, and bring the new notes thus tendered into court at the trial. 3 Black. Com. 303; 2 Kent's Com. 509; *Brooklyn Bank* v. *Degraw*, 23 Wend. 342, 345.

This was not done. It is true, the defendant Wilcox testified that, at the time when the plaintiff called at his store on this subject, he "offered him his notes upon the time provided in the extension agreement, which he declined to receive." But he subsequently adds that he had not the notes drawn at the time he made the offer.

As we have seen, this was not sufficient. By the agreement, —as interpreted by the defendants, and by their action under it,— the plaintiff was entitled to the new notes, at all events; and, to make the defence set up available, the defendants were required to have them in court on the trial, ready for delivery.

Judgment affirmed.

JOHN O. WOODRUFF AND OTHERS *v.* THE COMMERCIAL MUTUAL INSURANCE COMPANY.

A policy of marine insurance contained a provision (in the memorandum clause) that all goods were "warranted by the insured free from damage or injury from dampness, change of flavor, &c., except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." A cargo of grain, shipped in one bulk under this policy, was damaged—one portion by actual contact with sea water, and another portion by dampness or sweat communicated from that part of the cargo which was actually wet.

Held, that the insured were entitled to recover for all the damage done by the contact with sea water, whether caused by immersion in the water, or by dampness communicated to the upper portion, from contact of sea water with the lower portion.

A policy of marine insurance contained, in the body thereof, a clause in manuscript making "grain subject to average if damaged ten per cent." The printed memorandum clause annexed to the policy warranted "grain free from average, unless general;" and further warranted it "free from damage or injury from dampness, change of flavor, &c., except caused by actual contact of sea water with the articles damaged, occasioned by sea perils."

Held, that the effect of the policy was to insure against loss on grain subject to average, if damaged ten per cent.; but with the warranty that it should be free from damage, except by actual contact with sea water.

Held, therefore, that the insured could not recover for damage to the grain insured, resulting from effluvia arising from putrid hides, which formed part of the lading of the vessel. BRADY, J., dissented.

Where an instrument is partly written and partly printed, the manuscript portions must control.

THIS cause came before the general term on a verdict for plaintiffs, taken subject to the opinion of the court upon questions of law reserved. The action was brought to recover upon a policy of insurance made by defendants. This policy covered shipments already made, and others to be made, by plaintiffs, and reported to the company, and endorsed by them on the policy. Among the shipments thus endorsed on the policy, were 7,658 sacks of wheat, mentioned as having been shipped from New Orleans for New York by the ship Toulon.

It appeared, on the trial, that some of the sacks of wheat had ›en damaged by actual contact with sea water; others had been ımaged by dampness or sweat; and others, again, by stench and fluvia from hides, which formed part of the lading of the vessel, ıd had become putrid.

The defendants conceded their liability for so much of the ›ain as had been damaged by actual contact with sea water, and ıey had made payment for this before the trial. But they con-›nded that, on the true construction of the policy, they were not able for either the grain damaged by dampness or sweat, or for ıat damaged by the stench from the putrid hides. The judge irected a verdict for the plaintiffs for $10,159.98, principal and ıterest, subject to the opinion of the court at general term on ıe liability of the defendants under the policy.

The clauses of the policy important to the determination of the uestions raised, are quoted at length in the opinion of BRADY, J.

Luther R. Marsh, for the plaintiffs.

William D. Booth and *Francis B. Cutting*, for defendants.

BRADY, J. This is an action on a marine policy of insurance, ssued by the defendants to the plaintiffs, on 7,658 sacks of wheat, hipped at New Orleans, on board the ship Toulon, in Decem-er, 1855. The evidence showed that some of the sacks of ›heat had been in actual contact of sea water, shipped in heavy ›eather, or admitted through leaks occasioned by severe gales. The question presented is one of construction, as will appear ereafter.

The policy is partly printed and partly in writing. By the rinted memorandum, so designated in the policy, it is agreed, mong other articles therein enumerated, that grain is warranted y the assured "free from average, unless general," and also free from damage or injury from dampness, change of flavor, r being spotted, discolored, musty, or mouldy, except caused y actual contact of sea water with the articles damaged, occa-

sioned by sea perils." And further, "that, in case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise, and that the same practice shall obtain as to all other merchandise, as far as practicable." By the written part of the policy, on the first side or page thereof, and having priority, in the order of the agreements, over the printed memorandum and warranty, it is declared as follows: "This policy is also to cover such other shipments as the company may approve and endorse hereon. Grain, provisions in bulk, and each ten hogsheads of tobacco, in the order of the invoice, subject to average, if damaged, twenty per cent. on the river passage, or ten per cent. on a sea passage." It was conceded that the grain had been damaged by actual contact with sea water, on sea passage, ten per cent., and the defendants have paid to the plaintiffs the amount of damage arising from such actual contact of sea water in its original state, but refuse to pay for the damage beyond that, insisting that, under the warranty, they are not responsible, notwithstanding the written agreement in reference to grain herein recited.

It is said, in Phillips on Insurance, (1 Vol., § 124), that the predominant intention of the parties, in a contract of insurance, is indemnity, and that this intention is to be kept in view and favored in putting a construction upon the policy. It is also a rule well established, in the construction of instruments consisting of a printed form, that the words superadded in writing are entitled to have greater effect attributed to them than the printed words, and may supersede them, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning. 1 Phil. on Ins., § 125, and cases cited. It is also said, in Parsons on Contracts, (Vol. 1, p. 28), that what is printed is intended to apply to a large class of contracts, and not to any one exclusively; that the blanks are left purposely, that the special statements or provisions should be inserted which belong to this contract, and not to others, and thus discriminate it from others. And further, (page 29), that

t is reasonable to suppose that the attention of the parties was more closely given to those phrases which they themselves selected, and which express the especial particulars of their own contract, than to those more general expressions which belong to all contracts of this class. In an action on a charter party, where a printed and written clause related to the same subject, OAKLEY, Ch. J., in deciding the question of construction submitted, said that the written clause, in accordance with a familiar principle, must govern the construction of the agreement. *Weiser* v. *Maitland*, 3 Sand. S. C. R. 818.

The written agreement in reference to grain, in the policy under consideration, is utterly inconsistent with the printed agreement which relates thereto—the former determining the defendants' liability, if the damage is equal to ten per cent. on a sea passage, in which case the grain is subject to average; and the latter absolving them from liability, unless the average is general. The former must therefore prevail, on the principles stated, unless there is something in the policy which restricts or controls it.

The questions which present themselves at this stage of the inquiry are, Did the assured warrant the grain free from average, unless caused by actual contact of sea water; and, if he did, where does such warranty appear? I have given to this branch of the case all the consideration in my power to bestow, and it is my opinion that the assured gave no such warranty. Grain was not, by the specific agreement in writing, warranted free from damage, unless the average was general; nor was that the understanding or agreement of the parties. It is true, that the word grain occurs in the printed memorandum or warranty, but it is equally true that, in the agreement to which, in that connection, it is immediately allied, namely, a warranty from damage, unless general, it is utterly repugnant to the unquestioned understanding of the parties, that the grain would be subject to average, if damaged ten per cent. on a sea passage. From this it follows, that the word grain, employed where it is in the printed warranty, must be disregarded; and, as it does not ap-

pear in any other connection with the warranty, that it should be held to have been excepted therefrom. It also follows, that there is no warranty in relation to grain, and no exception in reference thereto, absolving the defendants from liability for damage, save only that it shall not be subject to average, unless damaged ten per cent. on a sea passage.

Words of exception, used by underwriters in a policy of insurance, to exempt them from general liability, are to be construed most strongly against them, (Story on Contracts, 3d ed., 764; 1 Duer, note 2, page 211); and, where doubt arises in the construction of language, the presumption must be in favor of the assured, as the language is that of the underwriter, (1 Phillips' Ins. 698, § 1163); and the contract, as one of indemnity, is to be liberally construed in favor of the assured, (1 Duer, 161, §§ 2, 5). To construe the warranty, in this case, in favor of the defendants, would be to extend it to an article not named in it in any connection within the intention of the contracting parties, and to give the defendants the benefit of an exception which the immediate language employed by the parties would necessarily repudiate. It is my opinion, therefore, that the defendants are liable for all the damage to the grain, such damage having been occasioned by a peril of the sea. *Montoza and others* v. *The London Assurance Co.*, 4 Eng. Law & Eq. R. 500.

Assuming, however, that the warranty extends to the grain, and that the defendants are liable, the plaintiffs, on the assumption suggested, warranted the grain free from damage, or injury "from dampness, change of flavor, or being spotted or discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." It might, perhaps, be sufficient to say, in reference to this clause, that the damage in this case appears to have been occasioned partly by actual contact of sea water, partly by heat or sweat generated or caused by the action of the sea water on the grain in the lower part of the vessel, and partly by fetid odors, arising from the action of sea water on the hides used in stowing the cargo; and that none of these causes, namely, heat, sweat, or fetid odors, being expressly

designated in the warranty, they are not covered by it, and the defendants are absolved. But I propose to consider the operation of the clause in question in its broadest view, as presented by the defence. It is conceded, as before stated, that a damage of ten per cent. to the grain was occasioned by actual contact of sea water, and it appears abundantly, assuming heat or sweat to be either dampness or to have caused a change of flavor, mustiness, or mouldiness, that the water, so in contact with the grain, was the *causa causans*, and damaged the balance, excepting, however, therefrom that portion which was injured by fetid odors arising from the action of the water on the hides. The damage was, therefore, in the language of the warranty, caused by actual contact of sea water with the articles damaged. If the correct construction of the warranty be, that the whole bulk of the article damaged shall be so damaged by actual contact of sea water in its original state, then the specifications in the warranty of dampness, change of flavor, or being spotted, discolored, musty, or mouldy, are entirely superfluous, and the agreement must be held to be, "warranted free from damage or injury, unless caused by actual contact of sea water," because there can be no doubt that, under the warranty, whatever the character of the injury may be which results from actual contact of sea water, whether dampness or mouldiness, or change of flavor, it is one for which the defendants would be chargeable. These words, dampness, change of flavor, or being spotted, discolored, musty or mouldy, can, therefore, have no other purpose or effect than to enlarge the undertaking of the underwriters to pay for injuries arising from those causes, or either of them, occasioned by, or resulting from, actual contact of sea water with some part of the article insured and damaged; and this is the construction which I adopt of the clause in question, assuming that it is applicable to the assured, which I do not admit. I think it may also be said with equal force, as matter of construction, founded on the principles already stated, that if part of the article insured be submerged, or immersed in sea water, occasioned by a peril of the sea, and the sea water be communicated indirectly by absorption, or

makes its way, upon any other principle of natural philosophy, from the article so wet to any part of the same article, the contact contemplated by the policy is created; or, in other words, if a portion of the article insured be damaged by actual contact of sea water in its original or fluid state, and other portions of the article insured be damaged by any cause occasioned by such contact, that the defendant would be liable under the warranty contained in the policy secured by the defendants. It is my opinion, therefore, that the defendants are liable for the damage shown to have been occasioned by the actual contact of sea water with grain, and for the damage resulting therefrom, on the assumption that the warranty applies to the assured.

It is my opinion, however, for the reasons heretofore given, that the sea water clause is inapplicable to the insured, and that he is entitled to judgment for the amount found by the jury, with interest.

INGRAHAM, First Judge.—I concur with Judge BRADY in the opinion, that where part of the wheat was damaged by actual contact with sea water, and the residue was damaged by dampness in consequence of such actual contact of part with sea water, that the plaintiffs are entitled to recover for such damage, both from actual contact, and the dampness to the residue arising from such contact.

The warranty is free from damage from dampness, change of flavor, color, &c., except caused by actual contact of sea water with the articles damaged. The dampness referred to in the warranty, is dampness to the article when it has not come in contact with the water. Where such contact has taken place, the insured are entitled to recover for all the damage done by such contact with sea water, whether caused by immersion in the water, or caused by dampness communicated to the upper portion from the contact with sea water of the lower portion.

But I do not concur in that construction of the policy, by which the article of grain is to be considered as stricken from the warranty by reason of the written portion of the policy,

which makes grain subject to average if damaged ten per cent. on the sea passage.

By the printed part of the policy, grain is free from average unless general. This is to be controlled, by the written portion of the policy, so as to read according to such written portion of the policy; and the warranty then applies to it in the amended form, so that the policy will insure the plaintiffs against loss on grain subject to average, if damaged ten per cent. on the sea voyage, but with the warranty that it should be free from damage except by actual contact with sea water.

As some of the damage in this case was occasioned by the smell from the hides, the defendants are not, under any construction of the policy, liable therefor. The amount of such damage does not appear, by the case, distinct from the other damage, and a new trial may be necessary, unless the parties agree to a reference to ascertain the amount of damage, excluding the portion so injured.

DALY, J., concurred.

New trial ordered—costs to abide the event, unless the parties agree to refer the case to a referee to compute the amount of damages, as suggested in the opinion of the first judge.[1]

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[1] This case was decided at August term, 1857, by INGRAHAM, first judge, and DALY and BRADY, associate judges; but was not reported in its order as to date, because the parties agreed to a reference, and the case was again brought before the court upon an appeal from the decision of the referee. It was therefore deemed desirable to have the whole case, with the decisions, reported in connection.

JOHN O. WOODRUFF AND OTHERS *v.* THE COMMERCIAL MUTUAL INSURANCE COMPANY.

In an action upon a marine policy of insurance, a verdict having been rendered for the plaintiff, subject to the opinion of the court at general term, the court, after argument, granted an order setting aside the verdict, and ordering a new trial, unless the parties would consent to a reference to ascertain the amount of the damages sustained by the plaintiff, exclusive of those arising from a cause held by the court not to be within the terms of the policy. The parties consented, and a reference was ordered accordingly. *Held*,

II. That the defendants, by their consent, waived their right to a new trial before a jury, and that the final judgment of the court at general term was reserved until the coming in of the referee's report.

III. That his report should be regarded in the same manner as a special finding of a jury, and ought not to be set aside unless it was against the clear weight of evidence, and the preponderance in favor of the unsuccessful party was so great as to lead to the conclusion not only that injustice had been done, but that the finding must have been the result of passion, prejudice, undue bias, or corruption.

III. That it was for the defendants to show affirmatively, on such reference, the extent, character, and amount of the injuries which resulted from the cause held by the court not to be within the terms of the policy; and, that the referee having found, as matter of fact, that no appreciable damage was caused thereby, and his report not being so clearly against the weight of evidence as to justify the court in setting it aside upon that account, it was properly confirmed, and judgment for the plaintiff, for the full amount of his claim, was correct.

APPEAL by defendants from an order confirming a referee's report, and from judgment entered thereon. The facts in this case, and the way in which it came before the court, are fully stated in the opinion.

William D. Booth, for the appellants.

Luther R. Marsh, for the respondents.

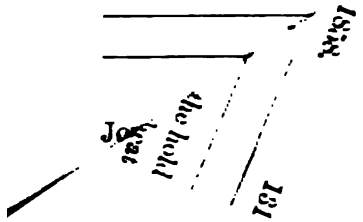
By the Court, HILTON, J.—The defendants insured a quantity of wheat in sacks shipped to the plaintiffs on board a vessel from New Orleans to New York. With the wheat was stowed a quantity of hides, and, on the voyage, the wheat was damaged and

the hides were rotted by reason of sea water flowing into such part of this of the vessel. The defendants admit that 2,250 bushels of wheat were damaged by a sea peril against which they insured to the amount of $4,490.17, and for which they have paid. But the plaintiffs claim that 7,658 sacks of wheat were thus damaged; and this action is brought to recover the difference between the alleged actual damage and the amount so admitted.

At the trial, before Judge BRADY and a jury, this sum was, by consent, ascertained to be $10,159.98, and for which a verdict was, likewise by consent, directed to be taken for the plaintiffs, subject to the opinion of the court at general term upon the questions of law reserved as to the liability of the defendants under a certain clause in their policy termed the "sea water clause."

The court at general term was of opinion that the defendants, under this clause, were liable for all damage arising from actual contact of the wheat with sea water, whether caused by immersion, or by dampness communicated to the upper tiers of wheat from the contact with sea water of the lower portion. But as it seemed to the court, from the evidence at the trial, that part of the damage claimed arose from the effluvia emitted by the decayed hides, and for which damage the defendants were not liable under their policy, a new trial was ordered, and the verdict so taken set aside, unless the parties would consent to a reference to ascertain the amount of damage, exclusive of the portion so injured. The parties subsequently consenting, a reference was ordered. The effect of this was that the defendants waived their right to a new trial before a jury, and the final judgment of the court at general term was reserved until the coming in of the referee's report.

Upon the reference, many witnesses were examined on both sides, and from their testimony the referee found, and determined as matter of fact, that the smell and stench from the decayed hides did not materially, or to any appreciable extent, affect any of the wheat except such as was in the lower tier of sacks, and which came in contact with the hides, and did not extend beyond the wheat with which the sea water came in contact, and for which



...said. The motion to confirm ...the defendants thereto, was, by ...rected to be heard at the special ...was ordered that it be confirmed, ...it for the amount of the verdict. ...ent the defendants appeal, and the ...o bring the case before the court at ...ermination and judgment, pursuant to ...trial, except that the court is now aided ...he referee upon the question of fact which the parties consented to submit to his decision, rather than go to a new trial before a jury.

The defendants ask that the report of the referee be set aside as being against the weight of the evidence before him, that the judgment be vacated, and a new trial ordered of all the issues in the cause before a jury.

The report of the referee must be regarded in the same manner as a special finding of a jury, and ought not to be set aside unless it is against the clear weight of evidence, and the preponderance in favor of the defendants so great as to lead to the conclusion not only that injustice has been done, but also that the finding must have been the result of passion, prejudice, undue bias, or corruption. Graham on New Trials, 452; *Jackson* v. *Loomis*, 12 Wend. 27; *Diblin* v. *Murphy*, 3 Sand. S. C. 19; *Keeler* v. *Fireman's Ins. Co.*, 2 Hill, 250; *Eaton* v. *Benton*, 2 Id. 576; *Collins* v. *Albany and Schenectady RR.*, 12 Barb. 492; *Lee* v. *Schmidt*, 6 Abbott's P. R. 183. But, on looking into the evidence taken before the referee, so far from being led to any of these conclusions, we think that it fully sustains his finding; and, although it is true that several of the witnesses have modified their views respecting the cause of the damage, as expressed on the trial, yet they stand entirely unimpeached—and the most that can be said of them is, that the reflection they have given to the subject has not been beneficial to the defendants' view of the case; besides, it should be borne in mind that, at the trial before the jury, they were only called upon to testify generally as to the cause of the damage, and their atten-

tion was not directed to the effect which resulted from such particular cause. When they were afterwards questioned as to this before the referee, they not only explained the entire subject of the damage, but did it so satisfactorily as to convince us that the verdict does not include damages resulting from the effluvia of the decayed hides.

Besides, it was for the defendants to show affirmatively, before the referee, the extent, character, and amount of the injuries which resulted from this smell or stench. They failed to do so; and, surely, it cannot be expected that, upon another trial, the same witnesses would, upon further reflection, vary their last testimony. There is nothing in the case to justify such an expectation, and we see no reason for withholding from the plaintiffs a judgment for the full amount of their verdict.

Judgment accordingly.

ERNEST JACOBS *v.* CORNELIUS G. KOLFF AND CHARLES T. PERSUHN.

The plaintiff, a broker, being promised a specified commission for effecting a sale of segars, procured an offer of $3.50 per thousand on credit of six months, or $3.00 per thousand cash, which he communicated to his principals. They refused to sell under $3.80. He then procured an offer of $3.50 cash; but, before he had communicated it to his principals, another broker had procured an offer, from the same purchasers, of $3.37 cash, and they had accepted it.

Held, I. That the plaintiff had not earned his commissions.

II. That when the price or limit of $3.80 per thousand was fixed, it was equivalent to contracting to pay the plaintiff the commissions agreed on, when he effected a sale at that price.

III. The contract being special, unless a sale was effected according to its terms, no action could be maintained upon it.

APPEAL by defendants from a judgment of the Marine Court. The action was brought to recover brokerage claimed by plain-

tiff under a special contract. On the trial, judgment was rendered in favor of the plaintiff, which was affirmed by the general term of the Marine Court. The defendants appealed. The facts out of which the claim arose, and the contract relied upon, are fully stated in the opinion of the court.

F. R. Tillou, for the appellant.

F. S. Stallknecht, for the respondents.

By the Court, DALY, First Judge.—The plaintiff was employed by the defendants, as a broker, to sell segars, of which the defendants had a million on hand—the defendants agreeing to give him one and a half per cent. commission on sales. The plaintiff took samples, but effected no sales—telling the defendants, some time after, that other houses gave him more brokerage, and that, therefore, he gave them the preference. The defendants then agreed to give him 25 cents per thousand brokerage. No limit as to price was fixed by the defendants, which left it optional with them to accept or reject such offers as he might bring them. He brought them an offer for the segars, from Ruhl, Von Keller & Co., of $3.00 a thousand cash, or $3.50 *on their note at six months*, which the defendants declined, telling him that they would not take less than $3.80 a thousand cash. A limit or price having now been fixed, their contract with the plaintiff, as a broker, amounted to an engagement to pay him 25 cents a thousand for effecting sales at $3.80 a thousand. It was a special contract, and unless the plaintiff, according to the terms of it, effected a sale at $3.80 a thousand, he could maintain no action upon it against the defendants. The plaintiff then procured another offer from Ruhl, Von Keller & Co. of $3.50 cash; but, before he had communicated it to the defendants, another broker, having heard, in the market, that the defendants had the segars for sale, and having seen Ruhl, Von Keller & Co., went, with an offer from them of $3.37 cash, to the defendants, for the entire lot, which the defendants accepted, paying this broker a commission of 12½ cents upon the thousand.

Upon this state of facts, it is sufficient to say that the plaintiff did not accomplish what he undertook—the sale of any portion of the segars at the stipulated price; and did not, therefore, earn the commission or brokerage agreed upon. The defendants were not obliged to wait until he brought them such an offer, but were at liberty to sell the segars at any price they thought proper. The plaintiff had brought them an offer from Ruhl, Von Keller & Co., at $3.50 upon a credit of six months, which they declined; and they did not sell to that house afterwards upon such terms, but at $3.37 cash for the entire lot, which they may have regarded, and which may have been, a more favorable offer. It does not even appear, from the testimony, that any of the previous offers of Ruhl, Von Keller & Co., made through the plaintiff, were for the whole lot; and, for all that we know, it may have been that the offer of $3.37 cash for the entire lot was a higher and better offer than any which Ruhl, Von Keller & Co. had previously made. But, however that may have been, it is sufficient to put our decision upon the ground that the plaintiff did not accomplish what, by the special contract entered into, he undertook to do; and that, therefore, he had no action upon it.

Judgment reversed.

ABRAHAM DRUCKER *v.* WILLIAM PATTERSON.

This court will not grant a rehearing of an appeal, upon an affidavit which merely shows that, on the first hearing, the counsel for the appellant was not duly prepared to argue the cause, and therefore entertains the belief that the court did not fully understand the questions involved in the case.

Nor does such an affidavit show any ground for allowing an appeal to the Court of Appeals, in a cause commenced in a district court.

MOTION for a rehearing of an appeal from a judgment of a district court, or for other and further relief, &c. The affidavit of

George Carpenter, the appellant's counsel on the former hearing of this case, showed that he had been led to believe the argument of the appeal would go off for the term, by consent; and, in consequence, did not make due preparation for the argument. That, on the day when the cause was first reached, he was engaged in another court, and respondent's counsel applied to take his default, but the court reserved the cause until the next morning, upon condition that he should then come in and argue it. That he was thus compelled to argue the cause the next day, without points, and while unprepared. He further stated his belief that the court did not fully understand the cause upon the argument.

George Carpenter and *Augustus F. Smith*, for the motion.

Nicholson P. O'Brien, opposed.

By the Court, DALY, First Judge.—The ground upon which we are asked to grant a rehearing in this case, or for an order allowing an appeal to the Court of Appeals, is that the defendant's counsel was not duly prepared to argue it, and that he believes that this court did not fully understand the case upon the argument. As respects the ground that this court did not fully understand the case upon the argument, we have merely to say that our belief upon that subject is not the same as that of the defendant's counsel; and, as to the point that he was not as fully prepared, upon the argument, as he thinks he ought to have been, we have to say that, after reperusing the case upon this motion, with the benefit of all the light that he has been able to shed upon it, now that he has fully prepared himself, no new view of it has reached us; and we should not feel justified in sending a case to the Court of Appeals, in respect to which there is not, in our judgment, either question, doubt, or difficulty.

Motion for re-argument denied, with costs.

PIERRE FRANCOIS RENAUD AND OTHERS *v.* EDWIN PECK AND OTHERS.

A purchaser of goods is not bound to return them, in order to entitle him to damages for a breach of warranty. He may claim damages in an action against him for the price, and his defence will not be barred by the continued possession of the goods; by delay in giving notice to the vender; nor even by omitting altogether to give such notice, and using or selling the property.

Where sufficient and competent proof, on a question of value, was before the jury, their verdict will not be set aside for an error of the judge in allowing witnesses to state their opinions on the subject, unless there are strong probable grounds to believe that the merits of the question were not fully and fairly tried, and that injustice has been done.

Proof of the amount for which goods sell at auction, is admissible as a circumstance to be considered on the question of value; but it is neither conclusive, nor in general sufficient, without other proof.

In an action for the price of ribbons, where defendants relied on the fact that the goods were of an unmerchantable quality: *Held*, that it was not necessary that defendants should have unrolled each of the cartons on which the ribbons were put up, to ascertain the character of every yard; but it was sufficient that they unrolled a number of cartons, and that all those examined were found to be unmerchantable.

APPEAL, by plaintiffs, from a judgment upon a verdict. The action was brought to recover for goods sold and delivered. It appeared that, on October 3d, 1854, the defendants ordered from the plaintiffs seventy-six cartons of black velvet ribbons, to be procured by plaintiffs from France. The written memorandum, given by defendants when ordering the goods, specified the quantity and description of ribbons desired, but was silent as to quality. It appeared, however, that in the oral negotiations attending the order, it was agreed that the ribbons "were to be of good quality." The plaintiffs undertook that "they should come out first rate goods—equal to steamboat brand."

On the arrival of the goods, they were delivered to the defendants, who inspected them, in the usual way, by opening the cases and examining the exterior of the cartons as they laid in the

[illegible] The appearance of the goods ordered was [illegible] figure woven through it. The defendants [illegible] in manner to their customers, but they were [illegible] intermediate, and is fraudulently manufactured [illegible] to deceive a purchaser. The deception consisted in manufacturing the ribbons so that about two yards of the whole piece on each carton were of the proper quality, while the remainder was but plain ribbon, devoid of any velvet or figure, and comparatively worthless. This was the case with many cartons examined, and very many of them were [illegible]. The fullness, however, was inspected in this way, so that the entire quantity was fraudulently manufactured, and the goods were not of the quality ordered and [illegible].

[illegible] not, it was claimed, that the plaintiffs knew of the fraud, or knew the manufacturer; indeed, it appeared that they had employed them to rely upon an inspection of the cartons and ribbon in explosion of the deception. Apart from the necessity of opening and re-tying each carton, it seemed that the unrolling of the ribbon, in thus examining it, would necessarily injure it and render it less valuable, and in some degree unmarketable.

The principal questions upon the appeal arose upon the admissions of evidence respecting the value and marketable quality of the ribbons, and are fully set out in the opinion of the court. Exceptions also were taken to the charge of the judge, but it is unnecessary to refer to them here, as the opinion sufficiently specifies their nature.

C. Bainbridge Smith, for the appellants.

I. Regarding the contract as an executory one, the plaintiffs having sold and delivered the goods on the 23d of February, 1857; and the defendants, having retained them until the latter part of the month of May following, without offering to return them, or giving notice of their defect, must be presumed as having waived all objections to the goods, and acquiesced in their quality. *Har*

gous v. *Stone*, 1 Seld. R. 73–86; *Ely* v. *O'Leary*, 1 E. D. Smith R. 355; *Muller* v. *Eno*, 3 Duer R. 421; *Howard* v. *Hovey*, 23 Wend. R. 350; *Hart* v. *Wright*, 17 Id. 277; *Dickson* v. *Jordan*, 11 Ired. R. 166; *Grimaldi* v. *White*, 4 Esp. 95; *Milner* v. *Tucker*, 1 Car. & P. 15, (11 E. C. L. R. 300); *Street* v. *Blay*, 2 B. & Ald. 456, (22 E. C. L. R. 122); 2 Kent's Com. 480; Chitty on Cont. (8th Am. ed.) 405. 1. The defendants had a reasonable time, after the sale and delivery of the goods, to examine and return them; and the question, what was a reasonable time for them to do so, is one of law. *Ely* v. *O'Leary*, *supra*; 2 Parsons on Cont. 190; *Kingsley* v. *Wallis*, 14 Maine R. 57; *Holbrook* v. *Burt*, 22 Pick. R. 546; *Rogan* v. *Gunther*, 11 Gill & J. 472. (*a*) The defect could have been discovered by the unrolling of a single piece, and that would not have been inconvenient; nor would the inspection of all have been impracticable; but in such case an examination is not dispensed with, but applies only "where goods are sold before their arrival or landing." *Hart* v. *Wright*, 17 Wend. 276. (*b*) The defendants should have, immediately upon receiving the goods, examined them, and not waited three months, and then only discover their inferiority after they had sold about half of them The time is unreasonable. *Hargous* v. *Stone*, 1 Seld. 73–86–92, and cases above cited. 2. The court charged the jury that "the principal point in this case, therefore, is, whether the defendants were concluded by the length of time that had elapsed before they discovered the defect, or by their not offering to return all that they had received." The judge said that, in his view of the law, they were not—to which the plaintiffs excepted. This ruling is in direct conflict with all the authorities upon the subject. *Hargous* v. *Stone*, 1 Seld. 73–92; *Ely* v. *O'Leary*, 2 E. D. Smith, 355, and cases cited above. (*a*) As to what constitutes "reasonable time," in law, for a vendee to examine goods sold and delivered to him under an executory contract, see *Hargous* v. *Stone*, *supra*. (*b*) No breach of warranty is set up, nor fraud imputed to the plaintiffs; and, if both were alleged and proved, they would only apply to latent, not patent, defects. *Schuyler* v. *Russ*, 2 Cai. 202; *Wright* v. *Hart*, 18 Wend. 449; *Hargous* v. *Stone*, 1

Seld. 86; *Chanton* v. *Hopkins*, 4 M. & W. 399, *Howard* v. *Hoey*, 23 Wend. 350; *Voorhees* v. *Earl*, 2 Hill, 288.

II. Between the time the goods were ordered, and a reasonable time to examine them after they were delivered, the contract was executory; but, when the "reasonable time" elapsed, the contract was executed. "An executed contract is one in which the object of the contract is performed." *Fletcher* v. *Peck*, 6 Cranch, 136; Story on Cont., § 15; cases above cited. 1. The defendants' having had the goods in their possession for three months, and having sold a large portion of them, is conclusive evidence of acquiescence and acceptance. 2. If the contract was executed, and not executory, it is immaterial what the goods or their value were. The rule *caveat emptor* applies. *Seixas* v. *Wood*, 2 Cai. R. 48; *Swett* v. *Colgate*, 20 J. R. 196; *Welsh* v. *Carter*, 1 Wend. 185–189, and cases above cited.

III. The defendants failed to prove the defence, as alleged in their answer. The defence set up is, that on or about the 23d of December, 1857, the plaintiffs sent to the defendants a case of velvet ribbons, alleging the same to be in fulfilment of an order previously given; that the defendants, within a reasonable time thereafter, upon inspection of said velvet ribbons, discovered that the same were of a very inferior quality and material; that the defendants, immediately upon ascertaining the said quality and condition of said case of velvet ribbons, rescinded their contract to purchase, and offered to return said ribbons to the plaintiffs. 1. The allegation of the defendants, rescinding the contract, is properly set up; but there can be no rescission of a contract unless the parties can be placed *in statu quo*. *Voorhees* v. *Earl*, 2 Hill, 288–297; *Fisher* v. *Conant*, 8 E. D. Smith, 199; *Kimball* v. *Cunningham*, 4 Mass. 50.

IV. It was in the power of the defendants to show what damages they sustained, and, not doing so, the maxim *omnia præsumuntur contra spoliatarum* applies. *Armory* v. *Delamere*, 1 Strange, 504; 1 Smith's L. C. 151; *Clunnes* v. *Perry*, 1 Camp. 8, and n.; *Bell* v. *Frankis*, 4 M. & Gr. 446; 43 E. C. L. R. 234; *Lobb* v. *Stanley*, 5 Q. R. 574; 48 E. C. L. R. 572.

Shea & Richardson, for the respondents.

I. This was an executory contract, and the rule "*caveat emptor*" has no application. *Howard* v. *Hoey*, 23 Wend. 351–2; *Chanton* v. *Hopkins*, 4 M. & W. 399; Addison on Cont. 228; *Muller* v. *Eno*, 14 N. Y. R. (4 Kernan) 610.

II. A gross and deliberate fraud was practiced in the manufacture of the ribbons, and the purchaser, in such case, provided he act without unreasonable delay after discovering the fraud, has the right to rescind, and return the goods; or, in an action for the price, he can give in evidence the real market value of the article in reduction of the plaintiff's claim. *Muller* v. *Eno*, 14 N. Y. R. (4 Kernan) 598, and authorities cited under the 4th point.

III. The notice to the plaintiffs, and offer to return, was sufficient in time, and as to the amount of goods. 1. It was done the moment the fraud practiced was discovered. 2. The defendants offered to do all that the nature of the case permitted, under the circumstances.

IV. The measure of damages, in such case, is, the difference between the value of the goods, if they had corresponded with the order, and their actual value. *Voorhees* v. *Earl*, 2 Hill, 288; *Cary* v. *Gruman*, 4 Id. 625; *Muller* v. *Eno*, cited above, 604; Addison on Cont. 265–6; *Howard* v. *Hoey*, 23 Wend. 353. 1. Whether "reclamations" had been made upon the defendants by the purchasers, or not; and the prices or circumstances attending the sales, by the defendants, to third persons; are not proper matters of inquiry in this action. *Muller* v. *Eno*, *supra*, and cases cited. 2. The defendants offered to show what proportion of the original cost was realized by the sale of the goods. The plaintiffs objected. 4 Denio's Rep. 292.

V. The amount of the verdict is not less than the evidence justifies. The plaintiffs offered no evidence as to the value of the goods, but merely that the market price of velvet ribbons (and other goods) had fallen about one-third since these goods were sent to the defendants; and this was done with the view

of having an additional reason why they did not take back the goods.

By the Court, BRADY, J.—There was evidence given, on the part of the defendants, tending to prove that the ribbons ordered by the defendants were to be of "good quality," that "they were to come out first rate goods," "equal to steamboat brand;" and, upon the questions, whether that was the agreement, and whether the ribbons delivered corresponded with the order given, the jury have found for the defendants. Upon the trial, it was insisted that if the defendants wished to avail themselves of any breach of warranty, they should have returned the ribbons, or have offered to do so, within a reasonable time after their delivery; and the cause seems to have been tried on the theory that, by law, such duty was imposed upon the defendants. The plaintiffs have no reason to complain of any rulings upon that theory. It was favorable to them, but it is not the law applicable to such contracts as that proved herein, and the rights that flow from them. In this case, no fraud was charged upon the plaintiffs personally, they not having manufactured the goods; and in cases where there is no fraud, and no agreement that the goods may be returned, it is doubtful whether, on account of the breach of an express warranty, the purchaser has a right to rescind the sale and return the goods. But, if the right does exist, arising upon warranties, express or implied, it is well settled that the purchaser is not bound to exercise it. He may claim damages in an action against him for the price, and his defence will not be barred by the continued possession of the goods; by circumstances of delay in giving notice to the vendor; nor even by omitting altogether to give such notice, and using or selling the property. *Muller* v. *Eno*, 4 Kernan, 602; *Waring* v. *Mason*, 18 Wend. 425; *Boorman* v. *Johnson*, 12 Id. 566.

The defendants were therefore entitled to recoup the damages sustained by them, on account of the difference in quality between the article ordered and that delivered. The doctrine of *caveat emptor* has no application to a case like this. The agreement

was executory. The goods were not within the view of the buyer, but were to be forwarded, (*Howard* v. *Hoey*, 23 Wend. 351–2; Story on Sales, §§ 369, 371; 2 Kent's Comm. 480; *Muller* v. *Eno*, *supra*, 610); and the right of the defendants to damages cannot be defeated by the application of that principle of law. The defence set up having, then, been well interposed, and the objections to its general character being disposed of, it remains to be determined whether, for certain exceptions taken on the trial, a new trial must be ordered.

The first exception to which our attention was called, was taken to the following question: "What effect would it have had upon the saleableness of the ribbons to have unrolled each carton?" The evidence proposed to be elicited by this question, and given by the witness, was wholly immaterial. The defendants were justified in unrolling some of the cartons, but they were not compelled to do it; and there was therefore no element against their defence which they were thus obliged to anticipate. But, as we shall see hereafter, the admission of this evidence, though improper, furnishes no reason for granting a new trial. The plaintiffs also duly excepted to the decision of the judge in allowing the following questions to be put and answered, namely: "What were those goods worth, to sell at that period, to a person knowing what they were?" "What, in your opinion, would they have brought in open market, with a knowledge of their condition?" "What would they be worth to any person, to use?" It may be said, I think, with great propriety, that the goods, about which the opinion of the witness was thus asked, were not a merchantable article, having been manufactured out of the ordinary mode, and with a view to practice a fraud upon the buyer, whoever he might be; that it was not possible to establish a general market value of such fabrics, and that their value necessarily depended upon circumstances about which the opinion of a dealer was incompetent and unreliable. I think, however, that the testimony was immaterial. The first and second inquiries tended to show that the ribbons would be worth nothing; and the answer to the third inquiry was that "they would be worth about twenty-five

per cent. of the cost price." There was, however, abundant evidence in the case, on the subject of value, elicited by the question put to the witness Benjamin, as follows: "How much less were those goods worth, than they would have been if they had been a first rate merchantable article?" And this question embraced the measure of damages, which is the difference between the value of the goods if they had corresponded with the warranty, and their actual value. Under such a state of facts, to induce the granting of a new trial for an error of the judge, there should be strong probable grounds to believe that the merits have not been fully and fairly tried, and that injustice has been done. *Crary* v. *Sprague & Carew*, 12 Wend. 41; *Mitchell* v. *Hinman*, 8 Wend. 672; *De Peyster* v. *Col. Ins. Co.*, 2 Caines, 90; *Hunt* v. *Burrill et al.*, 5 John. 138; *Supervisors of Chenango* v. *Birdsall*, 4 Wend. 458; *Clement* v. *Brooks*, 13 New Hamp. 32; *Prince* v. *Shepard*, 9 Pick. 176. In addition to this, it may be said that no exception appears to have been taken to the statement of the rule of damages, and that the plaintiffs offered no proof on the subject of value. The case does not, on the whole evidence, present strong grounds to believe that the cause was not fairly disposed of on the merits, so far as the plaintiff is concerned, or that injustice has been done. Nor does it appear that the opinion of the witness Peck, though improperly admitted, either misled or improperly influenced the jury. The plaintiffs, therefore, are not within the doctrine of the rule stated, and are not entitled to relief for the cause assigned. *Farmer's and Manuf. Bank* v. *Whinfield*, 24 Wend. 419.

The plaintiffs also objected to the proof, by the witness Peck, of what some of the ribbons brought upon a sale at auction; and, the proof being received, excepted to the ruling of the judge in that respect. Proof of the amount for which goods sell at auction, is, as I understand the rule, admissible as a circumstance to be considered on the question of value; but that it is neither conclusive, nor probably sufficient, without other evidence. There being other evidence in this case, the exception is not available, nor were any of those already mentioned; and this brings us to the consideration of the exceptions to the charge.

The first exception is to that part of the charge in which the judge asserted "that it was not necessary for the vendees to unroll every carton, to ascertain what was the character of every yard of ribbon." It has already been stated that the defendants were not bound to perform that ceremony. We were not furnished, upon the argument, with any principle or authority to the contrary. The defendants, if they chose to rely on the assumed fact that the cartons not unrolled corresponded with those unrolled, might do so. It affected the question of evidence, but their relations to the plaintiffs imposed no such duty as that suggested by the exception. The charge was therefore, in this respect, correct.

The next exception is "to the ruling distinguishing this case from any other sale of goods, upon the ground of the fraud practiced in the fabrication of the article." The exception is too general, and cannot be considered.

The plaintiffs also excepted to the statement of the judge that "$1,500 worth of the ribbons, it would appear from the statement of Mr. Peck, were sold at private sale, on which the defendants realized fifty cents on the dollar." The exception was not well taken. The judge did not incorrectly state the testimony of Mr. Peck. It will appear, from the statement of Mr. Peck, that he so said; and of that statement, the jury were to judge for themselves. At best, it was but saying to the jury, "It would seem, from the testimony of Mr. Peck, that $1,500 were sold," &c. This form of comment upon evidence has never been the subject of exception, and there is no authority to sustain an exception to it.

The remaining exceptions all relate to the theory heretofore commented on, by which it was assumed that the defendant could not retain the ribbons and recoup his damages. The charge was more favorable to the plaintiff, in this respect, than was required by the rules of law applicable to such cases, and the plaintiff has no cause to complain.

Judgment affirmed.

ISAAC GREEN PEARSON *v.* DANFORTH W. FISKE.

As a general rule, an appellate court will never interfere, upon a question of fact, with the finding of the tribunal before whom the witnesses were examined, and whose appropriate and special duty it is to pass upon questions of fact that must be determined upon conflicting testimony.

The only exceptions to this rule, are:

I. That they will reverse for the want of evidence.

II. Or when the verdict or finding is against evidence, in respect to which there is no contradiction nor conflict.

III. And, in extreme cases, although there may be some conflict or contradiction in the testimony, when, after full and careful deliberation, they are convinced that the verdict, finding, or report, must have been induced by partiality, prejudice, or corruption, or was the result of an obvious mistake.

Cases in which the court will interfere, upon the latter ground, are very rare.

An objection to a question that it is leading, is not available upon appeal, unless that was specifically stated as the ground of objection upon the trial.

It is a matter resting entirely in the discretion of the referee, whether he will allow a party to be recalled as a witness at the close of the case.

APPEAL by defendant from a judgment entered upon the report of a referee. The action was brought to recover for services rendered by the plaintiff, as steward and bookkeeper of the Clinton Place Hotel. The referee found for the plaintiff $200, and the defendant appealed mainly on the ground that the report was against the weight of evidence.

Emerson & Prichard, for the appellant.

F. H. Upton, for the respondent.

By the Court, DALY, First Judge.—After a careful perusal of the testimony, we are of opinion that we cannot interfere with the finding of the referee upon the question of fact. Upon the three questions in issue—*first*, Whether the plaintiff entered into a special agreement to serve as steward and bookkeeper at the same rate of compensation that he had received from Tallmadge?

second, Whether he fully and faithfully performed what he engaged to do, or what the law would imply that he had engaged to do from the capacity in which he served, and the nature of the duties undertaken by him? and, *third*, As to the general value of his services?—the testimony was conflicting; and where, in respect to any of the matters in issue, the testimony is conflicting, the general rule is that an appellate court will never interfere with the finding of the tribunal before whom the witnesses were examined, whose appropriate and special duty it is to pass upon questions that must be determined upon conflicting testimony. An appellate court will not assume the office of a jury, or of a referee, and weigh the testimony with the view of ascertaining on which side the weight of probability lies. They will reverse for the want of evidence; or, where the finding is against evidence, in respect to which there is no contradiction nor conflict, and in extreme cases, though there may be some conflict or contradiction in the testimony, they will set aside the verdict, finding, or report, if, after full and careful deliberation, they are convinced that it must have been induced by partiality, prejudice, or corruption, or was the result of an obvious and palpable mistake. Wherever there has been presumptively a fair and honest exercise of the judgment of the tribunal to which the law has committed the delicate and responsible duty of determining questions of fact upon conflicting evidence,—and that presumption exists in every case, unless the contrary distinctly appear,—a court of review will never interfere with the determination arrived at, however strongly inclined to think, if they had to pass upon the questions upon the same evidence, that they would have arrived at a very different conclusion. The cases, therefore, are extremely rare in which a court of review would exercise the delicate discretion of assuming that the finding must have been produced by prejudice, partiality, corruption, or palpable mistake. In the multiplied and various business of this court, there is scarcely a term that goes by, that parties, disappointed by the finding of juries or referees upon questions of fact, do not urge upon us that their case is one that calls for the exercise of this

discretion on the part of the court; and yet, through a long series of years, the instances have been very few, in which it has set aside a verdict, or a report of a referee, upon that ground.

The several questions objected to, were pertinent and material to the question at issue. The form of one or two of them was objectionable as leading, but the objection was not put upon that specific ground, and where it is not, it is unavailable upon review.

When the plaintiff was recalled, his examination was limited, by the referee, to testimony strictly rebutting; and, the testimony he gave, not being of that character, the referee struck it out. The calling of the plaintiff, under such circumstances, afforded no ground for a re-examination of the defendant; and, as respects the general right to recall the defendant at that stage of the case, it was a matter resting entirely in the discretion of the referee. The report should be sustained.

Judgment affirmed

BENJAMIN M. STILWELL AND SHUBAL E. SWAIN *v.* JOSEPH M. OTIS AND PIERSON M. OTIS.

S., a practicing attorney, drew an assignment for the benefit of creditors, in which O. & Co. were preferred. Upon the application of O. & Co., the assignee transferred the entire assigned property to them in payment of their claim, they agreeing to pay S.'s charge for drawing the assignment.

Held, that the promise was not within the Statute of Frauds, and was not required to be in writing. It was an original undertaking in consideration of the immediate transfer of all the assigned property.

The liability of the assignee for the same debt did not affect the obligation thus entered into.

APPEAL by defendants from a judgment of the Second District Court. The facts are fully stated in the opinion of the court.

J. C. Dimmick, for the appellants.

John B. Scoles, for the respondents.

By the Court, HILTON, J.—The plaintiffs are practicing lawyers, and bring this action to recover the value of their services in drawing an assignment for the benefit of creditors, executed by James Honiwell to John Honiwell, and in which the defendants were preferred for the amount owing them by the assignor.

It appears that, after the assignment had been executed and delivered, the defendants proposed to the assignee to transfer all the assigned property to them, in payment of their preferred debt. This offer was made in the presence of the plaintiffs, who acted as counsel for the assignee, and it was objected to, on the ground that its acceptance would leave no property or funds in the assignee's hands wherewith to pay the plaintiffs' charges for drawing the assignment, &c. The defendants then agreed to pay such charges, and the agreement was afterwards consummated by the assignee delivering to them all the assigned property.

Apart from the plaintiffs' evidence on the trial, these facts appear from the testimony of the defendant P. M. Otis, who, after detailing the several interviews which led to this agreement, adds, "I said we would pay the costs of drawing the papers. This was brought about by Mr. Swain. He asked who would pay the expenses. The assignee said he would have nothing to pay with. I supposed it was the best way to assume the thing, thinking it would only be $20 or $25. The bill of sale was executed, I think, the following day." And, again, "When Mr. Swain spoke of the payment of the expenses of the assignment, I did not ask him the amount of his bill; I supposed we would have to pay a reasonable bill."

The jury, by their verdict, found that $50 was a reasonable charge for the services of the plaintiffs, and for that amount, with costs, judgment was rendered.

It is quite obvious that the agreement of the defendants to pay this debt was not such as is required by the Statute of Frauds to be in writing. It was an original undertaking on their part, in

or the direction of the assignee immediately transferring to them all the assigned property, that they would pay the plaintiffs' charges for procuring the assignment.

It was a condition of the transfer that they should pay this debt, and the liability of the assignee for the same debt does not at all affect the character or extent of the defendants' obligation. *Leonard* v. *Tenebrough*, 3 John. 29; *Skelton* v. *Brewster*, Id. 376; *Mather* v. *Perry*, 2 Denio, 162; *Barker* v. *Bucklin*, Id. 45; *Delaware and Hudson Canal Co.* v. *Westchester Co. Bank*, 4 Id. 97; *Merrein* v. *Andrus*, 10 Wend. 461; *Ellicott* v. *Monk*, 5 Id. 235; *Blunt* v. *Boyd*, 3 Barb. S. C. 211; *Cadeaux* v. *Hall*, 1 E. D. Smith, 5.

Judgment affirmed.

PHILIP ROWLAND AND OTHERS v. GEORGE MILN.

A common carrier undertakes to deliver the goods entrusted to him under all events unless they are lost by the act of God or the public enemies; and he can maintain no action for freight unless he has fully performed his contract. Proof of delivery to the consignee is essential to the carrier's action for freight.

Where the transportation is by water, the proper place of delivery is on the wharf upon due notice to the consignee of the time and place of delivery. What is sufficient notice—considered.

If the consignee is absent, dead, or cannot be found; or if he neglects or refuses to receive the goods; the carrier, to discharge himself from liability, may place them in store with a responsible person, at the risk, cost, and charge of the owner. He cannot abandon the goods upon the wharf. If he does so, he is responsible to the owner for their loss or injury.

If the carrier relies upon a local usage as controlling the question of sufficiency of delivery, such local usage must be affirmatively established by proof at the trial. The court will not assume that a usage exists in contravention of the well established general rule in respect to the duties of carriers by land or water, upon the authority of a single case, in which such a usage has been proved and acted upon.

A carrier cannot excuse the non-performance of his contract to deliver, by showing that he was prevented from making the delivery by an illegal and unauthorized act of a public officer. If he relies, as an excuse for not delivering, upon the inter-

ruption or prohibition of a landing and delivery of goods by some person or power invested with legal authority to prohibit their landing or delivery, he must establish that the person or power, so interrupting or preventing a delivery, had legal authority so to do.

Neither a customhouse inspector, nor the collector of the port, has any authority to send goods to the public store, after the duties upon them have been paid, and a permit to land them has been given to the consignee.

When goods are taken out of the custody of a carrier by a public officer, upon the false assumption that he had the right so to take them, such officer is responsible to the carrier for any loss or injuries he may sustain by reason of his consequent inability to complete his contract and deliver the goods. And, in such a case, it is the duty of the carrier to follow the property, and see that it is duly delivered to the consignee; or, if he is unable to obtain possession thereof, so as to make such delivery, then it is his duty to hold the person, who has taken the goods out of his custody, responsible for the consequences.

APPEAL by defendant from a judgment of the First District Court. This action was brought to recover $43.23, freight on ninety-eight casks of ale. On the 17th of January, 1858, the ship Harriet Hoxie arrived in this port, having on board, among other cargo, a consignment of ninety-eight casks of ale to the defendant. On the 22d she commenced unloading, and on the 23d the ale was landed. No notice of its arrival was proved to have been given to the defendants, except so far as such notice might be deduced from the facts hereinafter stated.

On the 17th of January a permit was given to the defendant, by the collector of the port, reciting that the duties on the ale had been paid or secured, and giving permission to land the same. On the 23d of January a general order was issued from the customhouse, directing the inspector on board the Harriet Hoxie to send to the public store all packages, when landed, for which no permit or order should have been received by him. Fifty casks of the ale were sent to the public store, under this order, before the defendant presented his permit—the other forty-eight casks were delivered to, and received by, him. The inspector testified that a person, representing himself to be the defendant's cartman, and who was, he thought, the cartman that took the forty-eight casks, asked him for a certificate of the delivery of the fifty casks at the public store; and that he made out such a certificate, and

left it in the cabin for him. It further appeared that a bill for the freight claimed was presented to the defendants, by the agents of the ship, the first or second day after her arrival, at the foot of which bill was this memorandum: "Vessel at pier 18 East river. General order. Jan. 23, 1859." The defendant offered to prove that his cartman went several times to the vessel to get the freight with the permit, before the ale was landed, but did not exhibit it, as the ship was not discharging. The evidence was objected to, and was excluded. Judgment was rendered for the amount of freight claimed, and the defendant appealed.

Beebe, Dean & Donohue, for the appellants.

Benedict, Burr & Benedict, for the respondent.

By the Court, DALY, First Judge.—Before the plaintiffs could maintain an action for the freight upon the ninety-eight barrels of ale, they were bound to show that they had delivered them to the defendant, who was the consignee named in the bill of lading. *Forward* v. *Pittard*, 1 T. R. 27; *Harril* v. *Owens*, 1 Dev. & Bat. 273. Common carriers by land or water are bound to deliver the goods, entrusted to them to carry, to the consignee personally at the place of delivery. *Gibson* v. *Culver*, 17 Wend. 305. In this case, it was the duty of the plaintiffs to have notified the defendant that the goods would be delivered on the wharf at a time specified; and even then, unless he should desire them to be left on the wharf until he sent for them, or should otherwise assume the control and custody of them, as was the case in *Twiggan* v. *Duff*, (1 M. & W. 174), it would be their duty to store them with some responsible person for and on account of the owner, if the consignee should neglect to send for them, or refuse to receive them. They would not be justified, in such a case, in abandoning the goods upon the wharf; and, if they did so, would be liable to the owner for their loss or injury. *Ostrander* v. *Brown*, 15 Johns. 39; *Selwyn* v. *Holloway*, 1 Ld. Ray. 46; *Wardell* v. *Mowryllian*, 2 Esp. R. 693; *Twiggan* v. *Duff*, 1 M. & W

174; *Eagle* v. *White*, 6 Penn. R. 123. It was held, in *Fisk* v. *Newton*, (1 Denio, 45), that, where the transportation is by water, the proper place of delivery is on the wharf, upon due notice to the consignee of the time and place of delivery; and that, if the consignee is absent, dead, or cannot be found after due efforts, or if he refuses to receive them, the carrier, to discharge himself from responsibility, must place them in store with a responsible person, at the risk, cost, and charge of the owner. In the case of *The Grafton* (1 Olcott, 43,) there was proof that, by the established usage at this port, the landing of the goods upon the wharf, upon due notice to the consignee of the arrival of the vessel, and of the time and place of the delivery of the goods, was a sufficient delivery. So far as the question of delivery affected the decision of that case, the court was bound, upon this proof, to assume the existence of such a usage, and that the parties contracted with reference to it. In the case below, there was no proof of any such usage, and I am not willing to take the decision in the case of *The Grafton* as authority for assuming, as matter of law, that a usage prevails at this port in contravention of the well established rule in respect to the duties of carriers by land or water—a usage that would be attended with great inconvenience in many cases, and which would justify the carrier in abandoning the property upon the wharf, if the consignee, after notice, neglected or refused to receive it. I should want something more than the proofs presented in a single case, to recognize, as matter of law, that such was the general and universal custom at this port. *Schooner Reeside*, 2 Sumn. 567, per STORY, J.; *Turney* v. *Wilson*, 7 Yerg. 340; *Woodruff* v. *Merchant's Bank*, 25 Wend. 673; *Id.*, 6 Hill, 174; *Rushforth* v. *Hadfield*, 7 East, 225; *Gibson* v. *Culver*, 17 Wend. 308. In the case below, it did not appear that the defendant was notified that the casks of ale would be landed at the wharf on the 23d of January, except so far as the justice might be warranted in inferring that fact from a memorandum at the bottom of the freight bill, and from a cartman having taken forty-eight of the casks, the receipt of which the defendant acknowledged. Fifty casks were landed on that day, and, after remain-

ing upon the wharf for two hours, the customhouse inspector sent them to the public store. On the 17th of January, six days before, the defendant paid the duties upon the ninety-eight casks, and obtained a permit to land them. He offered to show that his cartman went with this permit to the vessel on the 18th, and again on the 21st, but did not exhibit it, as the vessel was not discharging; but the justice excluded the evidence. The same cartman, it would seem, went again on the 23d. The permit was shown to the customhouse inspector, but it was after he had sent the fifty casks to the public store, and the cartman brought away the remaining forty-eight casks, of which the defendant has acknowledged the receipt. If the plaintiffs had notified the defendant that they would deliver his goods at the wharf on that day, or that they had commenced to deliver the casks, it was a simple matter for them to show it, either by proving the fact by the person who gave the notice, or by calling the defendant as a witness and interrogating him respecting it. They were bound to make out their case, by establishing that they had discharged themselves from all responsibility by a due delivery of the ninety-eight casks, before they could recover for their carriage; and, in such an action, the justice was not warranted in inferring that the defendant had due notice of the time and place of delivery, upon evidence so loose and uncertain. If there was not, then, sufficient evidence to warrant the conclusion that the defendant had received due notice, it reduces the case to a landing upon the wharf of the ninety-eight casks, forty-eight only of which the defendant acknowledges that he has received. To entitle them to recover freight, they were bound to show that he had received the other fifty, or that they had duly delivered them. A common carrier undertakes to deliver under all events, unless the goods are lost by the act of God, or the public enemies; and he can maintain no action for freight, unless he has fully performed that contract. The plaintiffs claim that they have performed as fully as they could, and that they are not answerable for the act of the customhouse inspector in sending the first fifty casks to the public store. It appears that on the day when the casks were

landed, that is, on the 23d of January, the collector of the port issued a general order, to the customhouse inspector, to send all packages which might be landed from the vessel, for which no permit had been obtained, to the public store; and that the inspector sent the fifty casks in question to the public store, before he received the permit from the defendant's cartman. The inspector says that, after he had sent them, a person, representing himself as the defendant's cartman, and who took away the remaining forty-eight casks, asked him for a certificate of the delivery of the fifty casks at the public store, and that he made out such a certificate, and left it for the cartman in the cabin of the vessel. The demand, by the cartman, of this certificate, and the leaving it for him in the cabin, did not establish that the defendant had assumed the control of the property, or recognized the receipt and due delivery of it to him. In *Twiggan* v. *Duff*, (*supra*), notice was given to the consignee, on the day when the goods were landed on the wharf, that they had arrived, and the consignee's clerk, late in the afternoon of that day, signed, in the carrier's book, an acknowledgment that the goods had arrived for the consignee; and it was further shown that, upon former occasions, the consignee had notified the carrier to let the goods remain on the wharf until he sent for them; it was held that this was sufficient to submit the question to the jury, whether the consignee had not, by these acts, discharged the carrier, and received and accepted the goods. Here, then, was proof of previous deliveries of goods, in this way, by the consignee's direction, together with a written acknowledgment by the consignee's agent, after the goods were landed from the vessel, that they had arrived for him. This is a very different case from the leaving, by the inspector, in the cabin of the vessel, a certificate to the effect that he had sent the goods to the public store, which, for all that we know, may never have reached the defendant or his cartman, or have proved effectual to secure the due delivery of the property. The fact that the fifty casks were sent to the public store by the inspector, under a general order, before he had notice of the permit of the defendant, will not excuse the carrier,

nor absolve him from his contract to deliver. If the carrier relies, as an excuse for not performing, upon the interruption or prohibition of a landing and delivery of goods by some person or power invested with legal authority to prohibit their landing or delivery, he must establish that the person or power, so interrupting or preventing a delivery, had legal authority to do so, (*Evans* v. *Hutton*, 5 Scott N. R. 670); while here, neither the inspector nor his principal, the collector of the port, had any authority to send these fifty casks to the public store, the duties upon them having been paid, and a permit given to the defendant for the landing of them. Act of Aug. 6, 1846; Act of March 2, 1799, § 49; Act of March 3, 1849; Dunlop's Laws U. S., p. 1106–216, 1214. It was held in *Barker* v. *Hodgson*, (3 Maul & Sel. 267), which was an action for breach of contract against the charterer of a ship who had covenanted to send a cargo alongside at Gibralter, that it was no answer to the action that a malignant and infectious disorder prevailed at Gibralter at the time, in consequence of which all public intercourse or communication was interrupted and prohibited by the public and established law of the place. In *Hill* v. *Idle*, (4 Camp. 327), which was an action against the consignees for damages for not taking away certain hogsheads of wine within a reasonable time after the arrival of the vessel, after notice, it was held to be no answer that the wine could not be landed without an order from the treasury, and that the defendants, though they had used the greatest exertions and diligence, could not obtain the permit for landing them until nearly a month after the landing of the other part of the cargo. These cases show to what strictness parties are held, as to their liability upon contracts.

I have treated this case as one in which there was no certain or satisfactory evidence that the defendant had notice of the time and place of delivery; but, even if the plaintiffs had shown that they had given due notice, it would not have relieved them from their responsibility for the non-delivery of the fifty casks. When these casks were sent to the public store by the inspector, they were in the custody of the plaintiffs. It has been shown that if

the consignee, after notice, neglects or refuses to send for the goods, the carrier is still bound to take care of the property. When the casks, therefore, were landed on the wharf, it was their duty, whether they had notified the defendant or not, to look after them; and, if they were taken out of their custody by the inspector, upon the assumption that he had the right to send them to the public store, the inspector, or the collector if he directed the act, are responsible to the plaintiffs for any loss or injury they may sustain by their inability to complete their contract; or, at least, the duty was upon the plaintiffs, when the casks were wrongfully sent to the public store, to follow them, and see that they were duly delivered to the defendant; and, if they could not get the property, so as to make due delivery, to hold the inspector, or whoever had taken them out of their custody, responsible for the consequences. It was held, in *Goslin* v. *Higgins*, (1 Camp. 451), that the wrongful seizure of the goods by revenue officers, at the port of delivery, for a supposed violation of the revenue laws, was no answer to an action by the shippers, against the owners of the vessel, for the non-delivery of the goods. Lord ELLENBOROUGH said that the owners of the vessel had an action against the officers who had wrongfully taken the goods, but that the shippers could look only to the master or owner of the vessel.

The plaintiffs, having failed to show that they had delivered the fifty casks to the defendant, or that he had received them, could maintain no action for the freight; and the judgment must be reversed.

Judgment reversed.

EDWARD N. SCHMIDT AND MORRIS HOLLANDER *v.* HERMAN H. KATTENHORN AND GERHARD AHRENS.

In an action for damages for the unlawful conversion of certain goods, it appeared that the goods in question were sold by the plaintiffs to the defendants, on an agreement that they were to be paid for *in cash*. Previous to delivering the goods,

the plaintiffs made inquiries, in respect to defendants, as to whether they could be "trusted with a cash article," &c.; and, receiving a favorable answer, the goods were sent to defendants' store, by a cartman, in the ordinary way. Bills were sent in on the same day, followed by a call for the money on the day following, and on several days after. Defendants, however, refused to pay cash, but offered certain bills of exchange, drawn by plaintiffs, for a part of the amount, and the balance in cash.

Held, that this evidence did not show an unqualified delivery of the goods, but that it was a proper question for the jury, whether, in making the delivery, the plaintiffs intended to waive the condition for payment in cash; and that a motion to dismiss the complaint, on the ground that the evidence showed an unqualified delivery, was properly denied. DALY, F. J., *dissented*.

APPEAL by defendants from a judgment upon a verdict. The facts are fully stated in the opinions.

Fullerton & Dunning, for the appellants.

I. The judge ought to have granted the motion to dismiss the complaint, as the testimony, adduced on the part of the plaintiffs, showed that there was an unqualified delivery; and, the delivery being absolute, the title to the goods passed to the vendees: such absolute and unconditional delivery being regarded as a waiver of the condition. *Chapman* v. *Lathrop*, 6 Cowen, 110; *Lupin* v. *Marie*, 6 Wend. 77; affirming 2 Paige, 169; *Conway* v. *Bush*, 4 Barb. 564; *Jones* v. *Bredner*, 10 Barb. 193; *Brewer* v. *Salisbury*, 9 Barb. 511; *Genin* v. *Tompkins*, 12 Barb. 280; *Dows* v. *Green*, 16 Barb. 72; *Joyce* v. *Adams*, 4 Seld. 296; *Smith* v. *Lines*, 1 Seld. 44; *Caldwell* v. *Bartlett*, 3 Duer, 352. *a*. The plaintiffs reposed confidence in the firm of the defendants as a basis of the delivery of the property, without requiring cotemporaneous payment or satisfaction. *Clapp* v. *Rogers*, 1 E. D. Smith, 552. *b*. They did not ask for cash, but for a check—a check is a mere evidence of debt, the same as a note; they therefore waived the condition of cash payment on or after delivery. *Buck* v. *Grimshaw*, 1 Edwards, 140.

II. There is no evidence that, at the time of making the bargain, anything was said about cash payment on delivery; on the

contrary, the plaintiffs were willing to take a note. *Joyce* v. *Adams*, 4 Seld. 296.

J. Van Namee, for the respondents.

I. As the character of the delivery was a question of fact, it is absurd to say that on the testimony the complaint should be dismissed. *Smith* v. *Lynes*, 1 Seld. 41.

II. Trover was the proper remedy, or, rather, an action in the nature of an action of trover, under the circumstances. *Leven* v. *Smith*, 1 Denio, 571.

HILTON, J.—The plaintiffs sued for the damages resulting from the wrongful conversion of their property by the defendants. At the trial it appeared, from the evidence on the part of the plaintiffs, that the property consisted of brandy in casks, sold by the plaintiffs to the defendants for cash less 4 per cent., and delivered on the 24th and 25th of June, 1857. The bills were sent on the same day the goods were delivered, and followed up by the plaintiffs calling the next day for the money. Not finding the defendants at their place of business, a demand was made of their bookkeeper. Failing to get the money, the plaintiffs sent their clerk, who was told by the defendants to come again in a couple of days, and they would pay. After this, and about five or six days after the delivery, the plaintiffs again called and demanded the cash or the brandy. The defendants refused to give either, but offered to pay in two protested bills of exchange drawn by the plaintiffs, with a small sum in cash additional to make up the amount of the plaintiffs' claim for the goods thus purchased. It also appeared that after the sale was agreed upon, but before the brandy was delivered, the plaintiffs made inquiries respecting the trustworthiness of the defendants, to learn whether they could be trusted with a cash article; and, the information being satisfactory, the goods were thereupon delivered. The plaintiffs having rested their case, the defendants moved to dismiss the complaint upon the ground that this evidence showed a delivery of the property without qualifi-

cation, and therefore this action could not be maintained. The motion was denied, and the defendants excepted. Evidence was then introduced by the defendants, and the case submitted to the jury upon a charge of the judge to which no exception was taken, and a verdict found for the plaintiffs for the amount claimed.

On this appeal by the defendants, we are to review the decision of the judge upon the motion to dismiss the complaint, and to determine whether the evidence thus given was sufficient to warrant its submission to the jury upon the question, whether there had been an unqualified delivery of the property by which the condition of the sale was waived.

I think the evidence was clearly sufficient to show that the plaintiffs did not intend to waive the condition of the sale, or to make an absolute delivery; and it is equally apparent from it that the defendants did not suppose the condition was intended to be waived, or that the delivery was unqualified. *Leven* v. *Smith*, 1 Denio, 571. On such testimony, the judge very properly held that it was for the jury to say what was the intention of the parties upon which such a delivery was made; and he was right in refusing to dismiss the complaint. *Smith* v. *Lynes*, 1 Seld. 41; *Furniss* v. *Holt*, 8 Wend. 256; *Smith* v. *Dennie*, 6 Pick. 266; *Russell* v. *Minor*, 22 Wend. 662; *Van Neste* v. *Conover*, 5 How. P. R. 148.

The judgment should be affirmed.

BRADY, J.—The brandies purchased were delivered on the 24th and 25th of June, 1857. The purchases were for cash. On the day after the delivery of the first purchase, the defendants sent an order for the lot of the 25th of June, requesting the plaintiffs to send the bill by the bearer of their order. The bills were sent with the brandy, and the terms are stated on the bills to be for cash less 4 per cent. The bills were marked correct by the clerk of defendants. The plaintiff Hollander went to the defendants' store on the day after each delivery, and demanded a check from a young man in charge of the store, the defendants being absent. Hollander told him he had sold low for cash. The young man said he could not draw a check. Hollander then

sent his bookkeeper to get a check. The bookkeeper called twice. On the second occasion, he saw the defendant Kattenhorn, who said "Come in a couple of days, and I will pay it." The bookkeeper called, as requested, and the defendant Kattenhorn then offered bills of exchange drawn by the plaintiffs, and some money. Hollander, on the same day that this offer was made, went with his bookkeeper to the defendants, and demanded from Kattenhorn cash or the brandies. The defendants refused either. This interview was the only one between Hollander and the defendant Kattenhorn after the delivery, as appears by the testimony of both; and in this interview the plaintiff Hollander was for the first time advised by the defendants personally that they would not pay cash, or give up the brandy. He was probably informed the same day, by his bookkeeper, that the defendant Kattenhorn had offered bills of exchange in payment. It also appeared that the plaintiff Hollander made inquiries about the defendants—not before the purchase, but *after* the bargain was made—to know of their trustworthiness. He says "I wanted to know whether I could *trust him* (Kattenhorn) *with a cash article.* I said I must be cautious about *delivering;* and I said to him (Kattenhorn) that I was pleased with the good account I got of him."

On these facts I refused to dismiss the complaint, and my refusal, I think, was proper. The question presented by them was, whether the delivery was intended to be complete until the performance of the condition of payment of the cash. That question was submitted to the jury, and they answered in favor of the plaintiffs. The evidence shows that Hollander had satisfied himself that the defendants could be trusted with a cash article, without, at the moment of delivery, exacting the cash. His inquiries were not about the general credit or responsibility of the defendants—that was immaterial to him, his sale being for cash; and the demands upon the clerk of the defendants, and upon the defendant Kattenhorn, show that there was no intention to relinquish the payment of the cash. The promise of the defendant Kattenhorn to pay in a couple of days, after he was seen for the *first time,*

shows that he so understood the matter, and that he felt bound to comply with the terms of sale. It was not in evidence, at this time, that Hollander asked Kattenhorn for a note. That was proved on the defence, after which no motion was made to dismiss the complaint, and the cause was submitted to the jury. The fact is, that Behrens, who testified to the demand for the note, was mistaken, if he did not swear falsely. He proves two interviews, after the delivery, between Kattenhorn and Hollander, in one of which the former offered the bills of exchange; and states that in the other, which *occurred two or three days previously*, Hollander asked for the note. The defendant Kattenhorn swears that he first saw Hollander ten days or two weeks after the purchase—that the bookkeeper was present; and that he offered the bills of exchange. Hollander corroborates this. He says that he did not see Kattenhorn until he saw him with the bookkeeper, when the bills of exchange were offered for cash. There was no interview, then, between them, prior to that after the delivery, according to their own statements, and Behrens was in error. That was, however, if true, only a circumstance to be considered, with others, on the question submitted to the jury.

I think the testimony warrants the presumption that Kattenhorn did not intend to pay cash for the goods, and that the difficulty in finding him, or the other defendant, for the purpose of demanding the cash, arose from the fact that there was a negotiation pending for the purchase of the bills of exchange offered in payment, and that the defendants found it convenient to avoid the demand. Three visits were made to their place of business for the purpose of making that demand, and the object of those visits communicated to the clerk; yet, there is no evidence that they sent any communication to the plaintiffs on the subject. In addition to this, we have the fact that when Kattenhorn was finally seen, he promised to pay in a couple of days; he said nothing, however, about bills of exchange, and, by this promise, induced the plaintiffs to delay any action until the expiration of that time. The whole case does not show fair dealing, in a commercial point of view, on the part of the defendants. It con-

vinces me that the defendants knew well that the plaintiffs expected to be paid in cash, and that they did not intend to part with their property unless such payment was made. I thought so at the trial, and I think so still. In my opinion the judgment should be affirmed.

DALY, First Judge, (dissenting).—I do not see how it is possible, in this case, to sustain an action against the defendants for converting the property. The sale was for cash, but the delivery was absolute. No condition or qualification was annexed to it. No arts, device, or fraud were practiced by the defendants to get the property into their possession. One of the plaintiffs swore that, after receiving the order, and before delivering the brandy, wanting to know about the trustworthiness of the defendants, he made inquiries to know *if he could trust them with a cash article*, and that the result was satisfactory; that he told Kattenhorn, one of the defendants, that he must be cautious about delivering; that he had made inquiries, and that he was pleased with the good account he got of him; and, further, that the brandy was given to the cartman with no special instructions, but simply with directions to deliver it. Some days after the delivery, one of the plaintiffs called and asked the defendant Kattenhorn for a check; and, upon the latter saying that he was not prepared, but would be in a few days, the plaintiff asked if he would not be willing *to give his note*, as he (plaintiff) was very short. These facts, in respect to which there was no dispute, show that the sale was complete, that the delivery was unconditional, that no stipulation was exacted or imposed showing that it was to take effect upon the payment of the price, and that no fraud was practiced to effect a delivery. It was a cash sale, in which the article was delivered without exacting the cash at or before the delivery, or leaving it with the understanding that the title was not to pass until the money was paid. There could be no doubt, upon this state of facts, that it was the clear understanding of both parties that the defendants were at liberty to sell the brandy, or make use of it, the moment it was delivered, and that the plaintiffs relied upon the pecuniary

responsibility of the defendant Kattenhorn, with which they were fully satisfied before a delivery was made. See cases collected in the following case of *Lees & Waller* v. *Richardson*. Their only remedy was an action for the price. I think the judgment should be reversed.

Judgment affirmed.

JAMES LEES AND EDWARD WALLER *v.* THOMAS RICHARDSON AND OTHERS.

On a cash sale to a solvent buyer, where there is no fraud used to obtain possession, but the goods are voluntarily delivered in the usual and ordinary course of business, the title passes to the buyer by the act of delivery, and he has, with the possession, the right of immediate disposition, unless there are circumstances clearly showing that it was the intent of the parties that no title should pass until the cash was paid.

The mere fact that the sale was for cash, will not, of itself, be sufficient to warrant the legal inference that the delivery was conditional, and that no title was intended to pass to the buyer until the cash was paid.

As a general rule, on a sale of chattels, where no time is fixed for payment, payment and delivery are to be simultaneous acts, and the seller is not bound to deliver until payment is tendered.

But this rule is not applicable to the case of a sale of a large quantity of merchandise, the delivery of which may occupy considerable time, and in which some period must also intervene to enable the buyer to ascertain the correctness of the weight, to adjust the tare upon the different packages, and generally to ascertain the quality and condition of the merchandise received.

Where a custom is shown of allowing a buyer of merchandise a certain time to examine the quantity and condition of the goods delivered, during which no interest is charged on the purchase money, and the buyer is allowed to sell the merchandise freely, as well before as after payment, the parties must be regarded as contracting with reference to this usage; and, in such a case, though the merchandise be sold for cash, the title will pass upon delivery, although the cash is not paid.

Full effect should be given by the court to any commercial usage which recognizes the right of property as in the buyer, where it is voluntarily delivered to him, untainted by fraud and untrammeled by conditions, whether it be what is termed a cash sale, or a sale upon time.

The reasonableness and propriety of such a usage considered.

If a sale is conditional, the seller is bound to exact the performance of the condition, either at the time of the delivery, or very shortly thereafter; or he will be deemed to have waived it.

Upon a cash sale, the acceptance of a part of the purchase money is a waiver of the right to reclaim the goods, and perfects the buyer's title even though the delivery was conditional.

L. & W. sold to F., on the 1st of March, 312 tierces of lard for cash, which they proceeded at once to deliver to him, and which he proceeded to sell again to others. On the 5th of March, having 50 tierces remaining, he delivered 44 of them, together with another lot, all being included in one invoice, to R., as collateral to secure the repayment of certain advances. On the same day, L. & W. presented their bill to F. for payment, and, on the 9th or 10th, F. made them a part payment on account. A few days later, he gave them his check, post dated, for a part of the balance, but before its maturity he failed, and made a general assignment, for the benefit of his creditors, to L. In that assignment the claim of L. & W. was placed in a second class of preferred creditors, and 24 per cent. was thereafter paid them under the assignment. It appears that, by usage in the city of New York, from a week to ten days is given to buyers, in the case of cash sales, to examine and weigh the merchandise, &c., during which time it is customary for them to treat with and freely sell it, as well before as after payment. *Held*,

I. That the parties must be regarded as contracting with reference to this usage, and must be governed by it.

II. That the sale could not be regarded as conditional, but that the ownership and title passed to F. at the time of delivery.

III. That if it were otherwise, the acts of L. & W. in accepting a part payment and in taking the per centage under the assignment, and the act of L. in accepting the trust reposed in him by the assignment, were inconsistent with the idea that the sale was a conditional one, and waived any right to reclamation, even if otherwise they had possessed such right.

The cases upon the question, "What constitutes a conditional, and what an absolute sale?" collated and examined.

APPEAL by plaintiffs from a judgment entered on the report of a referee. This action was brought to recover the sum of $1,320 and interest, the value of forty-four tierces of lard alleged to belong to the plaintiffs, and to be unlawfully detained from them by the defendants. The cause was tried before a referee, who found and reported to the court the facts in the case, with his conclusions as follows:

"I do find that on the 1st day of March, 1856, the plaintiffs sold to one Fisher A. Fisher 312 tierces of lard, at 10¼ cents per

pound, amounting, in the whole, to $9,378.91, for cash; that the lard was delivered by the plaintiffs, to Fisher A. Fisher, on one of the wharves of the city of New York, where the same was weighed, and that such delivery was completed on the evening of the 4th of March, 1856; that, on the morning of the next day, a bill of parcels of the lard, showing the weight of the several tierces, the tares upon the same, the aggregate weight, the price per pound, and the sum total due for the lard, and stating that the terms of the sale were cash, was presented by the plaintiffs to Fisher A. Fisher. That on the 7th day of March, 1856, the plaintiffs demanded payment of said bills, which not being obtained, a similar demand was made on the 8th day of March, 1856. That, the amount still remaining unpaid, the plaintiffs, a day or two afterwards, made another demand upon Fisher for the same, when they received from him $2,000 on account of said bills; and that the next day Fisher A. Fisher gave to the plaintiffs, upon their demand for the remainder due them, his check for $5,000, which was not paid on presentment, and still remains due. That the plaintiffs, after the delivery of the lard, did not on any occasion demand from Fisher A. Fisher that the lard should be returned to them. That the said Fisher A. Fisher, on the 5th day of March, 1856, for a valuable consideration, before that time had and received by him from the defendants in this action, duly transferred to them forty-four tierces of the lard, the subject matter of this action. That the said Fisher A. Fisher failed in business, and suspended his payments on the 11th day of March, 1856, and on the same day made an assignment of all his property to James Lees, one of the plaintiffs in this action, preferring the plaintiffs, for the amount of the purchase price of the said 312 tierces of lard, in the second class of preferred creditors under the assignment; and that said assignment was executed as well by Fisher A. Fisher as by the said James Lees. That the said Fisher A. Fisher was not, at the time of the purchase of the lard, aware of his being insolvent, and that he bought the lard with the expectation and intention of paying for the same.

"I further find, as a conclusion of fact in this case, that the delivery of the 312 tierces of lard, by the plaintiffs, to Fisher A. Fisher, was conditional, upon the payment of cash; and further, that the *plaintiffs waived the said condition*, and that the *said delivery became absolute*, whereby the plaintiffs parted with the title and ownership of the said forty-four tierces of lard to the said Fisher A. Fisher, and to the defendants claiming under him. I further find, as a conclusion of fact, that the purchase was not made by the said Fisher A. Fisher with any fraudulent intent, or with any preconceived design of not paying for the lard."

Upon these facts, the referee reported in favor of the defendants; and, judgment having been perfected in their favor, the plaintiffs appealed.

Luther R. Marsh, for the appellants.

I. The sale was for cash. This is expressly sworn to, and is not denied.

II. The delivery was in pursuance of the contract, and on the same conditions. There was no waiver of the terms of sale. The delivery of the bill the next day, expressing that it was for cash, and the immediate and persistent pursuit of the cash, show (as well as the testimony of the purchaser himself) that there was no intent on the part of the plaintiffs to waive that condition. The intent of the parties is the thing that controls, in such cases. The following are some of the principal authorities to show that the intention of the parties governs, as to whether the delivery waives the condition of sale. *Furniss* v. *Holt*, 8 Wend. 256, 261–2; *Russell* v. *Minor*, 22 Wend. 664; *Acker* v. *Campbell*, 23 Wend. 372; *Leven* v. *Smith*, 1 Denio, 571; *Draper* v. *Jones*, 11 Barb. 263; *Van Neste* v. *Conover*, 5 How. Pr. R. 148; *Smith* v. *Lynes*, 1 Seld. 41; reversing *S. C.*, 2 Sandf. 203; *Aguirre* v. *Allen*, 10 Barb. 74.

III. If the sale was a conditional one for cash, and the delivery also conditional, then the property continued the plaintiff's until the payment of the cash; and, until that time, the purchaser, or any one standing in his place, held it as trustee or bailee of the

plaintiff. *Herring* v. *Hoppock*, 15 N. Y. R. (Smith) 409, 411, 412, 414.

IV. It is not necessary, in this case, to consider what would have been the effect of a sale by Fisher to a *bona fide* purchaser without notice, and for a consideration paid at the time. It is enough that this is not such a case. The defendants stand in no better situation than Fisher would have done. They paid noth ing for the lard. They were not purchasers for value. They took it as security merely to sell for Fisher's account, and, unless reimbursed, to apply the proceeds to a debt for previous advances —for advances made before the sale of the lard by the plaintiffs to Fisher. All that can be said for them is, that they stand in the same position as Fisher. *Haggerty* v. *Palmer*, 6 Johns. Ch. R. 437; *Keeler* v. *Field*, 1 Paige, 312; *Ash* v. *Putnam*, 1 Hill, 307; *Acker* v. *Campbell*, 23 Wend. 372; *Herring* v. *Hoppock*, 15 N. Y. R. (Smith) 409, 412.

V. Mr. Fisher was insolvent at the time of the purchase. He knew that his affairs were very uncertain, and he, immediately on getting this lard, and before payment, turns it over to defendants as security for their previous advances. This was fraudulent. *Keeler* v. *Field*, 1 Paige, 312.

Martin & Smiths, for the respondents.

I. There was no fraud in the purchase by Fisher, so as to entitle the plaintiffs to reclaim the lard on that account. He bought it in good faith, and intended to pay for it. The referee so finds as matter of fact, and his finding is sustained by the evidence. See *Lupin* v. *Marie*, 6 Wend. 77.

II. The title passed to Fisher by the delivery, so as to give him authority to pledge the property to the defendants. *Smith* v. *Lynes*, 1 Seld. 42. 1. The proof was conclusive that no usage existed such as that claimed by the plaintiffs; but, on the contrary, it was proved that it was the usage to dispose of the property as freely before payment as after.

III. The right of reclamation, if any existed, was waived by the plaintiffs. 1. After the delivery, and after several days had

passed, Fisher paid, and the plaintiffs received, $2,000 on account. 2. Fisher made an assignment, preferring the claim of the plaintiffs, to James Lees, one of the plaintiffs, and he afterwards paid to the plaintiffs, and they received, a dividend of 24 per cent. on their claim.

By the Court, DALY, First Judge.—The plaintiffs in this case, Lees & Waller, sold to one Fisher 312 tierces of lard at 10½ cents per pound, amounting to the sum of $9,378.91, for cash. The lard, at the time of the sale, which was on the 17th of March, 1856, was in a ship lying at one of the wharves in this city. The lard was landed from the ship, weighed by the plaintiffs upon the wharf, and then delivered to Fisher, who, having sold 262 tierces of it, delivered the amount sold by him from the wharf to the various parties to whom he had sold it. The delivery to Fisher was completed on the 4th of March, that is, within three days after the sale; and of the fifty tierces remaining, after the sale by him of the 262 as above stated, six were sent to his store, and the remaining forty-four tierces were delivered by Fisher, together with another lot of lard, all being included in one invoice, to the defendants on the 5th of March, 1856, in pursuance of an agreement previously made by him with them, by which they advanced to him $10,000 in cash, and $10,000 in their paper, in consideration of his depositing with them lard as security, to be sold by them on his account unless they were reimbursed—in pursuance of which agreement Fisher, at the time this arrangement was entered into, and afterwards, placed in their hands lard to the amount of nearly $24,000 at the invoice price, of which lard, so deposited, these forty-four tierces formed a part. This deposit of the forty-four tierces was made, as suggested, on the 5th of March, 1856, on which day the plaintiffs presented their bill to Fisher, containing the weight, tare, &c., of the 312 tierces, and left it for examination, it being usual for the purchaser to examine the return, calculations, &c., and compare them with his own figures. Two days after, the plaintiffs' clerk called, that is, on the 7th, and asked Fisher for the cash, but did not get it. He

called the following day with the same result, and again a day or two after, when Fisher gave him a check for $2,000 on account, Fisher saying that that was all that he could give that day, and which check was paid. A day or two after, Mr. Lees, one of the plaintiffs, called, when Fisher gave the plaintiffs a check for $5,000, which was not paid at presentment. On the 11th of March, 1856, the day of the date of this $5,000 check, Fisher failed; and, at 2 o'clock P. M. of that day, executed a general assignment to the plaintiff Lees for the benefit of creditors, in which assignment the sum remaining due to the plaintiffs Lees & Waller, for the lard sold, was included in a class of preferred debts, upon which the plaintiffs have received 24 per cent. from the assigned estate. The present action is brought by the plaintiffs Lees & Waller to recover from the defendants the value of these forty-four tierces, upon the ground that no title to them ever vested in Fisher, and that he could therefore transfer none to the defendants, the plaintiffs having demanded the forty-four tierces, and the defendants having refused to give them up.

Upon this state of facts, the referee has found that the plaintiffs parted with the title and ownership of the forty-four tierces, and I think he was justified, by the evidence, in so finding. This was a sale of a large quantity of merchandise for cash. The general rule deduced by the elementary writers, from the cases that have been determined, is, that where no time is fixed for payment, payment and delivery are to be simultaneous acts, and the seller is not bound to deliver until payment is tendered. Story on Cont. § 803; 2 Kent's Com. 496. This rule will apply very well upon the sale of a single chattel, as in the case put to illustrate it in Shephard's Touchstone, 224—the sale of a horse; but it is scarcely applicable in the sale of a large quantity of merchandise, the delivery of which may occupy considerable time, and in which some time must also intervene to enable the buyer to ascertain the correctness of the weights, to adjust the tare upon the different packages, and generally to ascertain the quality and condition of the merchandise received. As a matter of necessity, therefore, a custom has grown up in this city, in the sales of

merchandise in quantity, and which was proved before the referee, of allowing from a week to ten days for this purpose, during which period no interest is charged upon the sale by the seller. It was further proved, that when the buyer has received the goods, he has, by the custom, full control of them; and that it is the universal custom for the buyer to sell them freely during this time, as well before payment as after, though it would seem that, if the goods were sold to a stranger, it is not the custom to deliver until the price is paid, unless the buyer is well satisfied about him. The parties in this case must be regarded as having contracted with reference to this usage. There is nothing in the case to show that they did not. Fisher was not a stranger. He was a merchant doing business in this city at 84 Broad street. According to the witness, his business was buying to sell again, and he had dealt with the plaintiffs' house, and their predecessors, since the house was formed, more or less for four or five years, the plaintiffs having frequently sold lard to him before. There was no fraud—no pretence that he had wrongfully obtained the possession of the merchandise by any device or fraudulent representation. It was a fair sale in the ordinary course of business. He had a large amount of property at the time, in this city and in Europe, amounting to from $150,000 to $175,000. He had not, at the time, as he testified, any reason to suppose that he would not be able to pay for this lard, and his failure within a week after the delivery of it, that is, on the 11th of March, 1856, up to which period he continued all his payments, was occasioned by advices from Europe, on the 10th, of a large loss upon a sale of lard there—lard having depreciated in consequence of the confirmation of the news of peace between Russia and the allied powers, which created a panic in the public mind in relation to lard and tallow, of the first of which he appears to have been a heavy holder.

There was, then, in this case, a surrender of the merchandise into the possession of the buyer, induced by no fraud, and unaccompanied by any condition that he should not have the right to sell and dispose of it until he paid the price. The law in respect

to a conditional delivery upon the sale of goods is very well stated by Vice-chancellor McCoun in *Buck* v. *Grimshaw*, (1 Edw. Ch. R. 146): "Whether a sale and delivery be conditional or not, depends upon the particular facts and circumstances of each case. It may be the subject of express stipulation in the contract of sale, or a matter of subsequent agreement when the delivery is made; or it may be inferred, from the course of the transaction and the *usage* of a particular trade, that the vendor did not intend to make, or the vendee to receive, an absolute and unconditional delivery. But the condition must be made to appear as matter of evidence, otherwise the legal presumption would follow, from the fact of the purchasers being in the actual possession of the goods, that the delivery was an absolute one." In *Smith* v. *Lynes*, (1 Seld. 41), Paige, J., referring to a sale of goods on condition of being paid for on delivery in cash or commercial paper, declares that "the vendor, to avoid a waiver of the condition of sale, must either refuse to deliver the goods without performance of the condition, or he must make *the delivery, at the time, qualified and conditional*,"—citing *Lupin* v. *Marie*, 6 Wend. 81, and other adjudged cases determining this to be the law; and all the cases relating to conditional delivery are to the effect that it must appear, from the circumstances, that it was the *intent* of the parties that the delivery should be conditional—that is, that the property should not vest in the buyer; that he should not have the right to use or dispose of it until he had complied with the condition upon which it was sold. *Hussey* v. *Thornton*, 4 Mass. 405; *Whitwell* v. *Vincent*, 4 Pick. 449; *Keeler* v. *Field*, 1 Paige, 312; *Furniss* v. *Holt*, 8 Wend. 256; *Haggerty* v. *Palmer*, 6 Johns. Ch. R. 437; *Russell* v. *Minor*, 22 Wend. 664; *Mills* v. *Hallock*, 2 Edw. Ch. R. 652; *Copeland* v. *Bosquet*, 4 Wash. C. R. 588; *D'Wolf* v. *Babbet*, 4 Mason, 294; *Barret* v. *Pritchard*, 2 Pick. 512; *Buck* v. *Grimshaw*, *supra*; *Bishop* v. *Shilito*, 2 B. & Ald. 329, *note*. Where there is nothing in the circumstances to show that the delivery was thus qualified, the mere fact that the sale was for cash will not, of itself, be sufficient to warrant the legal inference that the delivery is conditional, and that no title is intended to pass to the

buyer until the cash is paid. This was expressly determined in *Chapman & Schoolcraft* v. *Lathrop*, (6 Cow. 110), in which it was held that, where goods are sold upon the condition that they are to be paid for in cash, and they are delivered without payment, the property passes, and the condition is waived. In that case, a quantity of merchandise was sold for cash, and delivered. The next day payment was demanded, and the buyer offered a note endorsed by the seller, and the residue in cash, which the seller refused to receive. A fortnight after the property was demanded, but the buyer refused to give it up. The seller brought trover, and it was held, upon the grounds above stated, that he could not recover; that the property passed to the buyer, and that the plaintiff's remedy was an action for the price. To the same effect was *Haswell* v. *Hunt*, cited in *Tooke* v. *Hollingworth*, 5 Term R. 231. A parcel of tobacco was sold, to be paid for in ready money. The plaintiff's servant delivered it without any order from his master to demand the money, and it was held that the title was vested in the buyer, who had become a bankrupt on the day when the tobacco was delivered. My conclusion, from the authorities, is, that in a cash sale to a solvent buyer, where there is no fraud, no art or device used to obtain possession, but the goods are voluntarily delivered in the usual and ordinary course of business, that the title passes to the buyer by the act of delivery, and that he has, with the possession, the right of immediate disposition, unless there are circumstances indicating, and clearly showing, that the intent was that the delivery should be merely conditional—that no title should pass until the cash was paid; and that it rests with the party, who claims such to have been the fact, to establish and make it out. The cases cited by the appellant do not conflict with this doctrine. In *Leven* v. *Smith* (1 Denio, 571,) the plaintiffs instructed their clerk not to deliver the goods, unless upon payment of the money. He took the goods, consisting of several packages of shoes, to the defendant's store, with the bill. The packages were compared with the bill, were found to be correct; and the defendant offered the clerk a note of the plaintiffs', and eight dollars in cash, in payment. The

clerk declined to receive the note, but said he would see the plaintiff, and take his directions. He accordingly left, was absent but four or five minutes, when he returned with the plaintiff's answer that he would not receive payment in that way, and with instructions to take back the goods. The clerk demanded the return of the goods or the payment of the bill in money, which the defendant refused. It was held that the plaintiff might maintain replevin; and it was very clear, in that case, that there was an intention, on the part of the plaintiff, not to deliver unless the money was paid. The decision was in conformity with *Bishop* v. *Shillito*, (2 Barn. & Ald. 331, *note*), in which it was held that if a tradesman sell goods to be paid for on delivery, and his servant, by mistake, delivers them without receiving the money, the tradesman, after a demand and refusal, may maintain trover against the purchaser. In *Van Neste* v. *Conover* (5 How. Pr. 148,) the sale was for cash, payable on delivery.—EDMONDS, J., says: "The agreement was *very precise* that the corn was to be paid for on delivery; and, *unless so paid for, was not to become the property of the defendant.* Of course, if such was the agreement, the delivery was conditional, and there was no waiver, the bill having been presented with the delivery of the last parcel, and payment demanded the following day." In *Draper* v. *Jones* (11 Barb. 263,) the sale was not complete. The terms were not finally adjusted. The goods were delivered with the understanding that they would be sold at a credit of four months, upon security satisfactory to the sellers, and, until it was ascertained what security would be satisfactory to them, there was no sale, though the goods had been delivered. The minds of the parties had not met. The contract was not concluded. It was open for the buyer to propose, and for the sellers to determine whether they would receive what should be proposed by him as the security; and, before that could be ascertained, and while the contract was in this unsettled state, the defendant failed. It was very clear, in such a case, that he acquired no title. In *Aguirre* v. *Allen*, (10 Barb. 76), which was in affirmance of a judgment rendered in this court, the question here considered did not arise—the goods, in that case,

were paid for; and *Acker* v. *Campbell* (23 Wend. 372,) was decided upon the ground of fraud: while, in *Herring* v. *Hoppock*, (15 N. Y. R. 409), there was an express stipulation, in writing, that Herring was not to part with, nor were the buyers to acquire, any title to the safe until the note, given for the purchase money, was fully paid. If the agreement had been drawn in view of all the authorities, it could not have been more precise.

In all these cases, therefore, the intention to make the delivery conditional is plainly inferable from the circumstances, while in this case there is nothing from which any such intention could be inferred. Fisher and the plaintiff were both doing business in the city of New York, and, in making this sale, they must be regarded as contracting with reference to a usage prevailing here, when nothing appears denoting a different or contrary intention. By that usage it is customary for the buyer to sell and dispose of what he buys immediately upon receiving it, without waiting until it is paid for, which is illustrated in this case by Fisher disposing of five-sixths of this lard, in the course of its delivery, to various purchasers, delivering their respective parcels to them on the wharf where he received it. That such a usage should prevail in a great commercial mart, where merchandise is constantly changing hands, is manifest. Goods must be constantly bought, predicated upon orders received for them, or where the buyer, contemporaneous with their purchase, has arranged for their resale, in which he becomes a mere conduit in their transfer to other purchasers. It would be a serious clog upon the facility of commercial transactions, if solvent buyers for cash were precluded from making any disposition of the goods delivered to them, until they had arranged and paid for them. It must frequently be the case, that the agreement of the buyer to pay cash is founded upon his ability to dispose of them to another for cash at a profit, and in which the cash received on the resale is relied upon as the fund for the payment of the original purchase. The law goes far enough when it holds that no title is acquired by delivery where the possession is obtained by fraud, and recognizes the right of the seller to impose, as a con-

dition, that no title shall be acquired by the buyer by delivery, until the price is paid, as well as the vendor's right, in case of insolvency, to stop the goods *in transitu*, before the delivery is complete. Beyond this, full effect should be given to any commercial usage which recognizes the right of property as in the buyer, where it is voluntarily delivered to him, untainted by fraud and untrammeled by conditions, whether it be what is termed a cash sale, or a sale upon time. It is much better to rely upon and give effect to those usages which have sprung up as the fruit of the experience of those engaged in the conduct and management of business, the utility, propriety, and necessity of which is manifest from their general recognition, than to devise rules for the disposition of commercial cases which have not, like the former, the test of experience. If, then, the plaintiff delivered the lard to Fisher with the mutual understanding, inferable from the usage, that he was at liberty to sell and dispose of it, which, as respects the greater part of it, it appears that he did as soon as it was delivered to him, they transferred, and meant to transfer, the title. The right to dispose of it before payment necessarily implies that the property was in him, and that they looked to and relied upon his personal responsibility for payment.

If any doubt could exist, it is removed by the ground upon which the referee placed his decision, that they afterwards accepted part of the purchase money. If a sale is conditional, the seller is bound to exact the performance of the condition, either at the time of the delivery, or within a very short time afterwards, or he will be deemed to have waived it. *Lupin* v. *Marie*, 6 Wend. 77; *Mills* v. *Hallock*, 3 Edw. Ch. R. 652; *Furniss* v. *Holt*, 8 Wend. 247; *Hennequin* v. *Sands*, 25 Wend. 641; *Cangus* v. *Ennis*, 2 Mason, 236. That this was not such a sale, is apparent from the plaintiffs' accepting $2,000 of the purchase money five days after the delivery, and after two demands had been made for payment. That very materially changed the position of the parties as respects the right of reclamation, even if the delivery had been conditional. If the condition is not performed, the

seller may reclaim the property, and, upon demand and refusal, may maintain an action for the wrongful detention. *Levin* v. *Smith*, 1 Denio, 571; *Hennequin* v. *Sands*, 25 Wend. 640; *Herring* v. *Hoppock*, 15 *N. Y. R.* 409. To place themselves in a position to maintain such an action, the plaintiffs would have to return, or offer to return, the $2,000 they had received. This they did not do, or offer to do. On the contrary, they not only kept the money, but, within two days after it was paid, Fisher made an assignment of all his property for the benefit of creditors to one of the plaintiffs, in which assignment the residue of the purchase money, $7,378.91, was included in a list of preferred debts, as a debt due and owing by Fisher to them, and upon which they have received a dividend of 24 per cent. All these acts are wholly inconsistent with the existence of a right on the part of the plaintiffs to reclaim from Fisher the 312 tierces of lard, upon the ground that the delivery was conditional, and the condition has not been performed, but are reconcilable only upon the assumption that the transfer of the property to him was absolute. It is suggested to us that the plaintiff Waller cannot be affected by the assignment to his partner Lees, which was made to Lees individually; but the acts of either party, so far as they relate to or affect this transaction, may be looked to when the object is to ascertain the intent with which the property was delivered by the firm to Fisher. It is said by WAGER, Senator, in *Russell* v. *Minor*, (22 Wend. 670), as the result of his examination of the authorities, "that the property will be considered as passing whenever, from the circumstances proved, the party might be considered as trusting to the ability and readiness of the vendee to perform the agreement on his part, and had, therefore, waived his right to insist upon strict payment or performance, on the part of the vendee, as a condition to passing the title." The evidence before the referee, in my judgment, established such a case, and his report should be confirmed.

Judgment affirmed.

GEORGE S. MENDELL *v.* RICHARD FRENCH.

Where the evidence is conflicting, the finding of the justice will not be disturbed on appeal from a district court, unless the evidence against the finding so greatly preponderates as to warrant the presumption of corruption, bias, or partiality.

It is not enough, in such a case, to warrant a reversal of the judgment, that the court may be of opinion that, as the evidence appears on paper, they would have found differently.

APPEAL, by plaintiff, from a judgment of the First District Court. The action was brought by the plaintiff, as assignee of one S. F. Mossman, who kept a bullion office. The defendant is proprietor of a hotel, and W. S. Bennett was, in January, 1858, his bookkeeper and bartender. Mossman testified that he was in the habit of supplying the defendant with change, and in January, 1858, delivered $100 worth to Bennett, taking from him a due bill in these words:

"NEW YORK, January 28th, 1858.

$100.00. Due T. Mossman, one hundred for change.

[Signed] R. FRENCH,

W. S. B."

The signature was in the handwriting of Mr. Bennett. Mr. Mossman testified that he was referred, by the defendant, to Mr. Bennett as the proper person to whom to give the change; and that Bennett told him, in the defendant's presence, that he was authorized to sign the defendant's name. The defendant denied that he had been accustomed to get change from Mossman; averred that Bennett was never authorized to get the money on his account, and had in fact used the money for himself. The justice rendered judgment for the defendant, and the plaintiff appealed.

Bogardus & Brown, for the appellant.

A. Woodman, for the respondent.

BRADY, J.—A perusal of the testimony in this case shows it to be conflicting. In such cases the finding cannot be disturbed.

unless the evidence against it so greatly preponderates as to warrant the inference of bias, corruption, or partiality, even although the court may be of opinion, as the evidence appears on paper, that they should have found differently. *Mazetti* v. *The N. Y. & Harlem RR. Co.*, 3 E. D. Smith, 98.

Judgment affirmed.

AARON SOLOMON *v.* ABRAHAM WAAS, AND MARIA WAAS HIS WIFE.

Prior to the Code, a husband might be arrested for a tort committed by his wife, was bound to put in bail for both, and after judgment she might be charged in execution with him; but if arrested before, she would be discharged upon proof of her coverture.

The law in this respect has not been changed by the provisions of the Code.

An agent to whom goods are entrusted to sell upon commission, who afterwards claims to have bought them from the principal, and upon that ground refuses to give the principal any account of what he has done, or to return the goods, may be treated as having converted them.

Where the right to arrest the defendant is derived from the nature of the action—*e. g.*, where the action is against an agent for the conversion of goods delivered to him to sell upon commission—the defendant will not be allowed, upon a motion to discharge from arrest, to introduce affidavits to prove that no cause of action exists.

Anonymous case (2 Duer, 613,) and *Tracy* v. *Leland* (2 Sandf. 629,) examined and disapproved.

APPEAL from an order at special term vacating an order of arrest. The plaintiff is the general assignee, for the benefit of creditors, of Marianna and Elizabeth De Young, and brought this action to recover for goods alleged to have been entrusted by the De Youngs to the defendant Maria Waas, as their agent, to be sold upon commission. The plaintiff obtained an order for the arrest of the defendant Abraham Waas. This order was based chiefly upon the affidavit of Marianna De Young, in which she alleged that she and Elizabeth De Young delivered to Maria Waas, as agent of the De Youngs, certain laces, em-

broideries, &c., worth $470.57, to be sold on commission; that Maria Waas was such agent for a long period, with the assent of her husband; that the deponent afterwards demanded the goods, or the proceeds of them, from defendants, but they refused to deliver them, the defendant Maria saying she had bought them, and could not settle for them, and she had nothing to settle for. The assignment of the claim to the plaintiff, and a demand by him, were also shown.

The defendant Abraham Waas moved, at special term, to vacate the order of arrest obtained against him. The motion was granted; and, from the order entered thereon, the plaintiff now appealed.

John A. Godfrey, for the appellant.

Edmon Blankman, for the respondent.

I. The plaintiff was not entitled to an order of arrest against either of the defendants in the first instance, because, 1. In an action against husband and wife, for a tort committed by the wife, neither defendants can be arrested. 8 How. Pr. R. 134; 1 Duer, 613. 2. That by the common law, a married woman is exempt from arrest (or mesne process) in all cases whatever. Code 1857, p. 288, *note C.* 3. The Code does not authorize the arrest of the husband, in any action founded on the *contract* or *tort* of the wife. 8 How. Pr. R. 134; 1 Duer, 613; *Tracy* v. *Leland*, 3 Code Rep. 47; 2 Sandford, 729.

II. The question, upon a motion to vacate an order of arrest, is whether, upon the whole case, as made by the affidavits on both sides, the court, if called upon to act upon the application as *res nova*, would grant the order of arrest. If it would, then the motion to vacate should be denied. But if, after hearing both parties upon the question, it should appear that a case for arrest has not been made out, the order should be vacated. *Chapin* v. *Seeley*, 13 How. 498.

By the court, DALY, First Judge.—A man is answerable to a third person, at the common law, for acts or injuries done by his

wife, if they afford ground for a civil action. *Heard* v. *Briscoe*, 5 Car. & P. 484. The wife, during the existence of coverture, cannot be arrested upon mesne process. To use the language of Blackstone, by marriage the husband and wife became one person in law, that is, the very being, or legal existence of the woman, is suspended during the marriage; incorporated or consolidated into that of the husband. 1 Bl. Com. 442. Such being the legal effect of the relation, the liability of the husband for the wife's tort or *quasi delict*, to quote the language of Mr. Macqueen, "stands upon a principle of necessity, as well as justice. For the wife alone cannot be sued in such a case, and if the husband were also protected from responsibility, the injured party would be entirely without redress." Macqueen on Husband and Wife, part 1, p. 127. As the law stood in this state prior to the Code, a husband might be arrested for a tort committed by his wife, and was bound to put in bail for both. After judgment, she might be charged in execution with her husband, but, if arrested before judgment, she would be discharged upon proof of her coverture, and on filing common bail. *Cornish* v. *Marks*, 6 Mod. 17; 1 Id. 8; Ventris, 49; *Crookes* v. *Fry*, 1 Bar. & Ald. 165; *Taylor* v. *Whitaker*, 2 Dow. & Ry. 225; *Clark* v. *Norris*, 1 H. Bl. 235; *Russell* v. *Buchanan*, 6 Price, 189; *Rangstaff* v. *Rain*, 1 Wils. 149; *Pitts* v. *Miller*, Strg. 1167; *Finch* v. *Duddin*, Id. 1237; *Berriman* v. *Gilbert*, Barnes, 203; Graham's Pract. (2d ed.) 127; 1 Tidd's Pract. (9th Lond. ed.) 194; see, also, *Ivins* v. *Butler*, 7 Ellis & Bl. 159.

Is there anything in the Code that has changed the liability of the husband to be arrested for the tort of the wife? In an anonymous case in 2d Duer (613,) Judge CAMPBELL is reported to have been of opinion that the Code, "in its *reasonable construction*," does not authorize the arrest of the husband in any action founded solely upon the contract or tort of the wife. The action was assault and battery committed by the wife, and he discharged the husband from arrest, it is said, after consultation with the other judges, who approved his decision. It would have been more satisfactory if an opinion had been given, and

the part or parts of the Code indicated or pointed out which admitted of or warranted this construction. To say that the Code, "in its reasonable construction," has changed the law, and taken away a right that existed before, without naming or pointing to the section, provision, or language that has had that effect, is, to say the least of it, a very loose way of determining a very important question. A plaintiff had the right, before the Code, to arrest the husband for a tort committed by the wife, and he has that right still, (2 Kent's Com. 149; Reeve's Dom. Rel. 72), unless the Code has abrogated it, or taken it away. I find no provision in the Code touching the subject, or which, by the most liberal construction, could be regarded as changing the law. It has not changed the legal relation of man and wife. They are not the less one person in the law now, than they were before. For the tort of the wife, the husband can still be sued. He is a necessary party, for she cannot be sued alone. Code, § 114; *Roach* v. *Quick*, 9 Wend. 238. Both are chargeable for a wrong done by the wife, and both must be joined as defendants. Comyn's Digest, tit. Pleader, 2 A 3; *Martel* v. *Fiestal*, 2 E. D. Smith, 91; Reeve's Dom. Rel. 69. Nor can they even plead separately; both must join in the plea. *Tampian* v. *Newson and wife*, Yelv. 210. He is, therefore, a necessary defendant in the action, and, as the wife never could be arrested, the 179th section, which declares that the defendant may be arrested where the action is for injuring, or for wrongfully taking, detaining, or converting property, must be applicable to him. The only provision that has any bearing upon the subject, is that part of section 179 which declares that no female shall be arrested in any action, except for a wilful injury to person, character, or property, which did not materially change the law, the Revised Statutes of 1829 having provided that no female should be imprisoned in any civil action founded upon contract, (2 Rev. Stat. 428); and the provision of section 114, that when a married woman is a party, her husband must be joined with her, so far as it affects this question, was merely affirmatory of the existing law. I am utterly at a loss to conceive upon what ground or reason the

judges, in the case referred to, came to the conclusion that the Code, "in its reasonable construction," had made this important change; and, though entertaining, as I should do, the highest respect for an opinion approved by all the members of a court, I cannot surrender my own judgment, and assent to it, where I find no provision in the Code, and am referred to none, which warrants or authorizes it.

This action is for the wrongful conversion of property by Maria Waas, the wife of the defendant Abraham Waas:—to recover the value of certain laces, embroideries, and other goods belonging to the plaintiff's assignors, Marianna and Elizabeth De Young, entrusted by them to Mrs. Waas to sell, as their agent, upon commission, which goods, or the proceeds, the defendants, upon demand, have refused to deliver to the plaintiffs. It does not appear upon what ground the judge below discharged the order of arrest. From the points and authorities handed in upon this appeal, it would seem to have been upon the ground, above referred to, that a husband cannot now be arrested for a tort committed by the wife. There is another ground suggested in the points, upon the authority of a decision of Justice MASON, (*Tracy* v. *Leland*, 2 Sandf. S. C. 729), that the wilful injury to property, for which the arrest of a female is allowed by the Code, is a physical injury, such as breaking it to pieces, or otherwise damaging it intentionally, whereby its value is lessened or destroyed. Though I do not concur in the conclusion arrived at in *Tracy* v. *Leland*, I do not consider it necessary to examine the question involved in that decision, as I cannot see how the point could affect the determination of this motion, as the question here is not the right to arrest the wife, but the husband.

The only remaining question, is the general cause of action sworn to in the affidavit upon which the husband, Abraham Waas, was arrested; and upon that point I suppose that an agent to whom goods are entrusted to sell upon a commission, who afterwards claims to have bought them from his principal, and upon that ground refuses to give his principal any account of what he has done, or to return the goods, may be treated as

having converted them. Such a case, against the wife, is made out by the affidavit upon which the husband was arrested. An affidavit of Mrs. Waas was read upon the motion, denying that she was employed as agent, and averring that she bought the goods; but this affidavit could not be received to disprove the cause of action. We have held, in *Geller* v. *Seixas*, (4 Abbott, 103; affirmed at general term), that where the right to arrest is derived from the nature of the action, that the defendant will not be allowed, upon a motion to discharge from arrest, to introduce affidavits to show that no cause of action exists. That would be trying the action upon affidavits on a collateral proceeding, which the court will never do.

Order appealed from reversed.

WILLIAM A. SALE, JR. *v.* JOHN DARRAGH.

It is not necessary, in order to take a sale of goods out of the Statute of Frauds, that the delivery and acceptance of a part of the goods to be sold should take place at the time of making the contract. A subsequent delivery and acceptance is sufficient. Disapproving *Seymour* v. *Davis*, 2 Sandf. S. C. R. 239, and approving *Sprague* v. *Blake*, 20 Wend. 61.

The present Statute of Frauds of this state differs materially, in this respect, from the English statute, and from that of this state prior to the Revised Statutes.

What is a sufficient note or memorandum of a contract of sale within the meaning of the Statute of Frauds, and how far parol evidence is admissible to add to or interpret it, considered.

St., being authorized thereto by both parties, effected a sale of 356 bales of hemp from S. to D., and signed the following memorandum of the contract:

"No. NEW YORK, 16th August, 1850.

Sold for account of Mr. WM. A. Sale, jr.,

To Mr. John Darragh.

Bales jute hemp a $80.00 per ton, six months.

This hemp is to remain in store at the expense and risk of the seller for the expiration of the first month; thereafter at the expense and risk of the purchaser. Mr. Darragh is to pay for this hemp as he may want to take it away, at the rate of 8 per cent. per annum discount. Tare 6 lbs. per bale."

The greater part of the hemp was delivered to D. in parcels from time to time, was

received by him and paid for on delivery, but none of it was delivered until nearly a week after the execution of the contract. *Held*,

I. That the delivery and acceptance of a part of the hemp, though subsequent to the execution of the contract, took the case out of the Statute of Frauds, and rendered D. liable in an action for damages for his refusal to accept all the hemp.

II. That St. being authorized, by both parties, as a broker to effect the sale, a memorandum in writing, signed by him in his own name, was a sufficient note or memorandum in writing, within the meaning of the Statute of Frauds, to charge the parties.

The memorandum failing to show the number of bales agreed to be sold, whether parol evidence was admissible to show what number was agreed to be sold, or that the number or quantity were to be ascertained; and whether the writing thus interpreted would be a sufficient note or memorandum of the contract within the meaning of the Statute of Frauds, *quære?*

It is a general rule of law, that where contracts are reduced to writing, parol evidence will not be received to enlarge, diminish, or in any way alter what is expressed in the writing. But where it is apparent, upon the face of the instrument, that something is contemplated and agreed upon by the parties which they have not defined or expressed with sufficient clearness, parol proof, connecting the instrument with its subject matter, is always allowable to show the intention of the parties.

This rule rests upon the presumption that, as the parties have reduced their contract to writing, they have expressed by it what they intended, and that therefore nothing should be received, except to interpret the writing where they have left what they meant obscure, doubtful, uncertain, or not fully expressed.

But where, by statute, a contract is required to be in writing in order to be valid, *quære* whether, where the parties have failed to express what they meant, the defect can in any case be aided by a resort to parol proof.

APPEAL by plaintiff from a judgment entered on the report of a referee. This action was brought to recover a balance claimed to be due on a sale of 356 bales of hemp. The complaint stated that the plaintiff, on August 16th, 1850, sold the defendant 356 bales of jute hemp, weighing forty-six tons, seventeen hundred weight, and one pound, at $80 a ton; that it was to remain in store at plaintiff's risk for the first month, and at defendant's risk afterwards, and the defendant was to pay for it as he took it away, at eight per cent. per annum discount; that the plaintiff delivered portions of it, and was always ready to deliver the rest, which the defendant refused to receive and pay for, and directed the plaintiff to have the part remaining sold for his

account, which the plaintiff did. Annexed to the complaint were schedules showing the sales and disposal of the hemp, and the whole account between plaintiff and defendant, as claimed by the plaintiff. The price of the hemp amounted to $3,748.04; and the complaint prayed judgment against the defendant for the sum of $535.30, balance of account. The answer, among other things, averred that there was no written contract, and that the sale was void under the Statute of Frauds. The cause was referred to John L. Mason, Esq., who reported in favor of the defendant. The following extract from his report shows the facts as found by him:—

"And I further certify and report, that the following facts appeared in evidence before me on the reference:

"That on the 16th day of August, one thousand eight hundred and fifty, the plaintiff sold to the defendant, through a broker, a large number of bales of jute hemp, the terms of which sale were reduced to writing, and a sale note executed therefor by the broker, in the words and figures following, to wit—

"'NEW YORK, August 16th, 1850.

Sold for account of Mr. WM. A. SALE, JR.,

To Mr. JOHN DARRAGH.

Bales jute hemp, at $80 per ton, six months.

This hemp is to remain in store at the expense and risk of the seller for the expiration of the first month; thereafter at the expense and risk of the purchaser. Mr. Darragh is to pay for this hemp as he may want to take it away, at the rate of eight per cent. per annum discount.

Tare 6 lbs. per bale.

JOHN E. FORBES & BRO.

DANIEL L. STURGES,
Broker in Fruits, Spices, Salad Oils, Hemp, and merchandise generally,
103 Wall-street.'"

This sale note was delivered by the above-named Daniel L.

Sturges (who was a clerk of John E. Forbes & Bro., and by whom the sale was made,) to the plaintiff. No bought note was signed by the broker or his clerk.

The number of bales sold was three hundred and fifty-six, though no number was mentioned in the sold note.

The reason of the plaintiff's selling the hemp, to be paid for by the defendant as he took it away, was, that the plaintiff did not like to take defendant's note for it, and it was to remain, and did remain, until sold and paid for, in the plaintiff's store, or under his control.

The greater part of the hemp was delivered to the defendant, in such parcels as he required, either for his own use, or upon orders given by him on the plaintiff in favor of purchasers to whom he had sold; and such parcels were paid for as they were taken away.

The first delivery to him was on the 23d day of August, one thousand eight hundred and fifty, and the remaining deliveries to him were in different quantities and at different times, in the years one thousand eight hundred and fifty, one thousand eight hundred and fifty-one, and up to the 27th day of January, one thousand eight hundred and fifty-two.

When the defendant required any of the hemp to be delivered, no weighing or other act was necessary to be done, except payment for the bales ordered. The hemp had all been weighed, and the weight marked on the bales, shortly before the sale to the defendant.

A portion of the hemp, however, remained unsold, which the plaintiff refused to take or pay for, alleging it to be damaged.

In consequence of such refusal, the plaintiff, in the months of February and March, one thousand eight hundred and fifty-two, sold these damaged bales, thirty-three in number, at a greatly reduced price.

It was not proved that the defendant gave any special authority to the plaintiff to sell these damaged bales on his account, neither was there any evidence that the plaintiff gave the defendant notice of his intention so to sell them.

Upon stating the account, the plaintiff's loss amounted to $535; to recover which, with interest from November 30th, 1852, this action was brought. No objection was made to the amount claimed, if the plaintiff was entitled to recover at all.

The facts proved on the trial, in relation to the damage, are not stated, because it is deemed unnecessary to consider the question whether the loss arising therefrom is to be borne by the plaintiff or defendant.

My conclusions at law, upon the facts above stated, are—

I. That there was no sufficient note or memorandum in writing of the contract, made and subscribed by the defendant, as required by the first subdivision of the third section of the act entitled 'Of Fraudulent Conveyances and Contracts, relative to goods, chattels, and things in action.'

II. That there was not such an acceptance and receipt of part of the hemp contracted to be sold, as is required by the second subdivision of the said third section of the act aforesaid, in order to charge the defendant in this action as the purchaser of the whole."

The following opinion was also given by the referee, showing his reasons for the conclusion to which he arrived:—

"There was no sufficient memorandum in writing of the contract between the parties in this case. The note offered in evidence, signed by the broker, was radically defective in not mentioning the number of the bales which were sold. It was, moreover, the sale note signed by the broker on behalf of the seller, and delivered to him, and not the bought note or memorandum on behalf of the defendant, the purchaser, who is sought to be charged. *Sivewright* v. *Archibald*, 6 Eng. L. and Eq. R. 286. But the defect in the note itself was fatal. To allow it to be supplied by parol proof, would manifestly be to repeal the statute.

Whether there was a sufficient acceptance of part of the goods to take the contract out of the statute, is a point of much greater difficulty, and on which the authorities are conflicting.

The acceptance in this case, if at all, was some time after the

contract was made, and the question arises, whether the acceptance must be at the time of the contract, or can be made at any time afterwards.

The defendant contends that the delivery and acceptance of part of the goods sold must be at the time of the sale, and that a subsequent acceptance of part does not make the agreement valid as to the whole; and, in support of this proposition, quoted *Seymour* v. *Davis*, (2 Sand. S. C. R. 239), which fully sustains his position. On the other hand, the plaintiff relies upon the case of *Sprague* v. *Blake* (20 Wend. 61,) as an authority in his favor; and it certainly does lay down the proposition broadly, that the part delivery of goods sold under a parol contract, and acceptance by the vendee, need not, by the statute, be made at the time of the contract; and the facts of the case rendered a decision on this point necessary. It is, therefore, a direct authority in support of the plaintiff's proposition. This case, though decided in 1838, is not adverted to in the case of *Seymour* v. *Davis*, decided ten years afterwards. It appears to me, however, that the cases relied on by the court in *Sprague* v *Blake*, are by no means conclusive on the question.

In *Vincent* v. *Germond*, (11 John. R. 283), the court did not decide that acceptance of part, after the making of the contract, took it out of the statute; but that the defendants' taking the three oxen afterwards was evidence that the whole number had been delivered to them at the time of the contract. 'The defendants,' they say, 'dealt with the oxen as their own, and as if in their actual possession, without asking any permission from the plaintiff for so doing. This must have been done in virtue of the right acquired by the original contract and *transfer of the property*.'

The same remark applies to *Chaplin* v. *Rogers*, (1 East. 192), which was referred to and relied on by the court in both the preceding cases. The court did not, in that case, hold that the taking away of part of the hay, two months after the bargain, was an acceptance; but that it was evidence of there having been a delivery and acceptance when the bargain was made.

Neither does the case of *Outwater* v. *Dodge* (6 Wend. 397,) show that a subsequent acceptance of part makes an oral contract good. The contract in that case was for a large number of barrels of fish. The bargain was concluded in the evening, and the fish was to be delivered the next morning to the defendant, who was to send a person to receive it; and the jury found that the defendant had accepted it at the time agreed on. It was not a case of delivery and acceptance of part of the subject matter of the contract, but of the *whole;* it was an *executed contract.*

The case of *Jennings* v. *Webster* (7 Cow. 256,) decides that, with regard to bulky articles which are not in the actual possession of any one, the words 'I deliver' is 'a good delivery, if the vendee afterwards takes possession of the thing delivered and disposes of it. His subsequently taking posession is evidence of the previous delivery, and of his acceptance.'

The only other case referred to by the court in *Sprague* v. *Blake*, is *Hart* v. *Satterly*, (3 Camp. 528). In that case, the court held that the whole of the goods purchased under a verbal order had been accepted by the defendant.

The question now under consideration cannot arise where the whole of the goods have been accepted. The exception in the statute only refers to acceptance of a part. In none of the cases cited, and, I believe I may add, in no reported case except that of *Sprague* v. *Blake*, is it anywhere held that the taking away of part of the goods after the contract, is an acceptance within the meaning of the statute; but merely that such subsequent taking away is evidence of the previous acceptance at the time of the contract. And the decision in that case appears to me to be contrary to the whole current of authority on this subject.

It is said, in *Smith* v. *Surman*, (9 B. & Cress. 561), by LITTLEDALE, J., that 'It was formerly held, that where the goods which were the subject matter of the sale, were not to be delivered till a future day, as one of the three things required by the 17th section (of the English statute, which is the same substantially as the 3d section of our present statute,) viz., a part acceptance

could not be complied with at the time of the contract, it was not a case within that section of the statute; but later authorities have established that such a contract, whether the goods are or are not to be delivered immediately, is within the statute. Those cases, therefore, have established, that if two things required by the 17th section can, at the time of the contract, be carried into effect, the case is within it, although one cannot be complied with;' and he refers to *Rondeau* v. *Wyatt*, (2 H. Bl. 67), *Cooper* v. *Elston*, (7 T. R. 14), and *Alexander* v. *Comber*, (1 H. Bl. 20), as establishing his position. If this be the fact, and there can be no doubt it is, it is conclusive to show that both the earlier and more modern judges held that the acts to be done, to take a parol contract out of the statute, must be done at the *time of making the contract.*

In *Shindler* v. *Houston*, (1 Comstock, 261), BRONSON, J., remarked—'A writing must be made. Part of the purchase money must be paid, or the buyer must accept and receive part of the goods. Mere words of contract, *unaccompanied by any acts*, cannot amount to a delivery. To hold otherwise would be repealing the statute.' Although this particular question was not presented by the case, yet the remark shows what the opinion of this learned jurist was on the point we are considering.

I think, therefore, that, with the exception of *Sprague* v. *Blake*, the remark of the late Mr. Justice SANDFORD, in *Seymour* v. *Davis*, (2 Sand. S. C. R. 263), was strictly true—that there was no authority for saying that a parol agreement to deliver goods at a future time becomes valid as to the whole, by the delivery of a portion subsequent to such time.

On the other hand, there is great force in the argument, drawn from the alteration in the Revised Statutes, in favor of the plaintiff's position.

The English statute, and our own previous to the revision of 1830, are silent as to the *time* when any note or memorandum in writing must be executed, or a part of the goods accepted, or part of the purchase money paid; and the uniform construction of the courts, as to the time, was founded on what was supposed

to be the reason of the thing, and the manifest intention of the legislature. In the revision of 1830, however, our legislature inserted, with regard to part payments, the words '*at the time*,' so that part payment of the purchase money *must*, by force of this legislative enactment, be made at the time of the bargain. The *insertion* of these words with respect to *payment*, and the *omission* of them with respect to *part acceptance*, and the *memorandum* in writing, certainly gives great reason for the inference that the legislature did not intend that these things must be done at the time; and the inference is much strengthened by reference to the revisers' notes, which were submitted to and were before the legislature at the time of this enactment. It will be there seen that the revisers proposed the words "*at the time*" should be inserted in each of the three subdivisions of this section. The legislature, having this alteration distinctly proposed to them, reject it in the two first and insert it in the last, viz., the one with regard to part payment. The inference appears to me to be very strong, if not irresistible, that the legislature did not mean to confine either the written memorandum, or the delivery and acceptance, to the time of the contract. And, indeed, there seems to be no reason why the written memorandum should be confined to that time. If the parties, after the making of the contract, agree upon its terms, and reduce them to writing, there seems to be no reason why it should not be binding. All the mischief intended to be guarded against will have been, by the memorandum, entirely prevented. And so, too, with respect to an acceptance of part of the goods: if the subsequent delivery and acceptance cannot be accounted for except by the fact of the previous agreement, there seems to be no reason why such subsequent acceptance should not be equally efficient as if made at the time. The evidence of the agreement is as strong in the one case as the other, and the danger of uncertainty as to the terms of the bargain equally great in both.

I am therefore inclined to consider the decision of the court in *Sprague* v. *Blake*, (20 Wend. 61), although contrary to the whole tenor of previous decisions both in this country and in

England, as more in accordance with our present statute than those decisions.

But it is not necessary for me to pass upon this question in the present case, because I think it is clear that there never was a delivery and acceptance of any part of the hemp so as to satisfy the statute. The plaintiff always retained his lien upon it until it was paid for. No delivery of any parcel on payment entitled him to take the residue without payment. Now, I understand the law to be well settled, that, in order to take a parol sale out of the statute, 'there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold.'—Per WRIGHT, J., in *Shindler* v. *Houston*, 1 Comst. 261; *Smith* v. *Surman*, 9 B. & Cress. 561. Such was not the fact in the present case. The plaintiff retained his lien over the whole, and only relinquished it as to any part of the goods on receiving payment. Mr. Sturges, the witness who settled the bargain, says expressly, that 'Mr. Sale permitted him to sell the hemp to Mr. Darragh, to be paid for as he took it away, as he did not like to take Mr. Darragh's paper for it,' and it always remained, in fact, until sold and paid for, in the plaintiff's store, and under his control.

Upon these grounds, then—I. That there was no sufficient note or memorandum of the sale, and, II. That there was not such a delivery and acceptance of part as is contemplated by the statute—I am of opinion that the complaint should be dismissed."

Judgment having been entered upon the referee's report in favor of the defendant, dismissing the complaint, the plaintiff appealed.

Benedict, Burr & Benedict, for the appellant.

I. It was proved that the defendant gave the plaintiff entire authority to sell *all* the hemp for him. It was in consequence of

this authority, and not in consequence of any refusal of the defendant to take them, that the plaintiff sold the damaged bales; and they were sold just as he had sold all the rest, about which there is no dispute as to his authority.

II. The sale note was a sufficient memorandum to satisfy the statute, certainly, taken in connection with the fact that there was a bill of parcels given to him, and received by him without objection. Browne on Stat. of Frauds, 388, 389; *Salmon Falls Manufacturing Co.* v. *Goddard*, 14 How. 446.

III. Part of the hemp was "accepted and received by the buyer," which, under the second division of the third section of the Statute of Frauds, upholds the contract even if there is no memorandum. *a.* It is not necessary that part of the goods shall be accepted at the time the contract is made. *Sprague* v. *Blake*, 20 Wend. 61; Browne on Stat. of Frauds, 344–7, and cases there cited. The reasoning of the referee upon this point is impregnable. *b.* The referee has found that "the greater part of the hemp was delivered to the defendant," and paid for by him as it was taken away. How, then, can it be said that part of the goods has not been accepted by the buyer? Browne on Stat. of Frauds. *c.* To hold that the acceptance of the part must be such as to vest the possession *of the whole* in the buyer, is to repeal the statute, which only requires the acceptance *of a part*—all that is required is that a part shall be accepted under the contract. Ib.

IV. The "receipt and acceptance," by Darragh, of "a part of the hemp" made the contract good, and parol proof of what the contract was, was admissible. The referee has found that it was a sale of 356 bales of hemp; and, there being no dispute as to the amount, the plaintiff was entitled to judgment for the amount claimed, and judgment for that amount should be rendered in his favor, with costs.

John Anthon, for the respondent.

I. There is no memorandum in writing to take the case out of the Statute of Frauds. The "omission of the thing sold" in the paper produced, and the "non-subscription of the party to be

charged," are each fatal to that document. To supply either by parol, would be to repeal the statute. 2 R. S. (3d ed.) 195; *Bailey* v. *Ogden*, 3 John. 399; *Peltier* v. *Collins*, 3 Wend. 459; *Davis* v. *Shields*, 26 Wend. 341; *James* v. *Patten*, 2 Seld. 11; *Sivewright* v. *Archibald*, 6 Eng. L. and Eq. 286.

II. The parol contract, in this case, was void under the Statute of Frauds when it was made, and could by no subsequent act become a valid agreement. Subsequent acts might establish a new contract of sale embodying more or less of the terms of the original arrangement, but cannot reanimate the previous void agreement. *Seymour* v. *Davis*, 2 Sandf. S. C. 244.

III. The delivery and acceptance of the several parcels of hemp under the agreement, or in consequence of it, made so many several and distinct contracts of sale, upon each of which each party had all the actions and remedies incident to an actual sale *pro tanto*. *Seymour* v. *Davis*, 2 Sandf. 245.

IV. By the terms of the parol agreement, the vendor was never to part with the actual possession of any part of the hemp until he was paid for it, and on this principle the parties acted.

V. The vendor always, until payment of each part, retained the actual possession in his own store, under his own key, and insured it as "undelivered" property. There never was a delivery of any more than was actually paid for, and after such delivery the remainder was retained in actual ownership. The successive deliveries spent themselves with each sale, and gave no force to the original contract. "To take the case out of the statute, there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he shall have precluded himself from any objections to the quantum or quality of the goods sold. To constitute a delivery and acceptance, *words* are not sufficient." *Shindler* v. *Houston*, 1 Comst. 269; *Rathbun* v. *Rathbun*, 6 Barb. 98.

VI. The claim in this case, which is for the thirty-three bales of damaged hemp, and for the storage and insurance of the whole

parcel, can only be sustained upon the principle of an entire valid contract, whereby the title to the whole became so vested in the defendant that he could have removed the same without payment, at pleasure—all which is directly in the teeth of the contract, by which plaintiff, on account of his want of confidence in the defendant, was not bound to deliver any part until actual payment, which was to be within six months.

By the Court, DALY, First Judge.—It is very clear, in this case, that the referee erred. It appeared, by the testimony of Sturges, that the defendant spoke to him about buying the hemp for him. Sturges accordingly opened a negotiation with the plaintiff and the plaintiff's clerk Hanford, the plaintiff agreeing that Sturges might sell the hemp to the defendant, to be paid for as it was taken away. Sturges agreed to the terms of the sale as stated in the memorandum or sale note, which expressed every thing except the number of bales and the weight, which were to be ascertained afterwards. The names of the buyer and seller were specified, the price per ton, the time within which the hemp sold was to be paid for; that it was to remain in the plaintiff's store at the expense and risk of the seller for one month, and thereafter at the expense and risk of the purchaser,—the defendant to pay for the hemp as he might want to take it away, at the rate of 8 per cent. per annum. This note or memorandum in writing was subscribed by Sturges in his own name, and given by him to the plaintiff. The defendant, in about a week after the making of the note, sent for eight bales, which were delivered to him; and, in the course of a year and a half, he sent for the greater part of the hemp, by orders from time to time, which was delivered upon his orders, and for which he paid at the rate agreed upon.

From this state of facts it appears that Sturges, who was a clerk of John E. Forbes & Bros., brokers, had authority from both parties to effect the sale. His authority, as respects the defendant, having been confirmed by the defendant's sending for the hemp from time to time and paying for what he received, as

agreed upon by Sturges. Having authority from both parties, as a broker, to effect a sale, a memorandum in writing of the contract, subscribed by Sturges in his own name, would be sufficient within the statute to charge the parties. *Goom* v. *Aflalo*, 6 B. & C. 117; Russell on Fact. and Brok. 66, 67; Blackburne on Cont. of Sale, chap. v. But the difficulty in this memorandum is, that it does not designate the quantity sold. It refers to bales of jute hemp at $80 per ton, which is again referred to as "this hemp." "*This hemp* is to remain in store," &c. "Mr. Darragh is to pay for *this hemp* as he may want to take it away," &c. A question therefore arises, as to whether this was a sufficient note or memorandum of a contract within the meaning of the statute. As the writing refers to bales of hemp, designating them as "this hemp," it might be read as referring to a particular lot of hemp the exact quantity of which could be shown by other evidence, or interpreted as a contract to sell a particular lot, the exact quantity of which was not known at the time of the making of the contract, but was to be ascertained afterwards—as if the parties had agreed in writing upon the sale of all the bales in a particular loft, or all that might come by a particular vessel. Parol evidence, in such a case, would not add anything to the contract, or alter or vary its terms; but would simply explain more fully and definitely an intent that was apparent upon the face of the instrument. It is a general rule of evidence, where contracts are reduced to writing, that parol evidence will not be received to enlarge, diminish, vary, or alter what is expressed by the writing, but is always admissible to aid in interpreting it. Where it is apparent upon the face of the instrument that something is contemplated and agreed upon by the parties, which they have not distinctly defined, or expressed with sufficient clearness, parol proof, connecting the instrument with its subject matter, is always allowable to show what the parties intended and meant. But the reason upon which this familiar rule of evidence rests, it must be confessed, is distinguishable from that which, according to the preamble of the Statute of Frauds, originally led to the enactment of the provision that certain agreements should be void, if not in writing. 1 Evans'

Stat., p. 211. In respect to the rule of evidence, it rests upon the presumption that, as the parties have reduced their contract to writing, they have expressed by it what they intended, and that therefore nothing should be received except to interpret the writing where they have left what they meant obscure, doubtful, uncertain, or not fully expressed. But where there is an agreement for the sale of goods of a greater value than fifty dollars, and no part of the purchase money is paid, or no portion of the goods have been delivered, the Statute of Frauds makes it essential to the very existence of a contract that it should be in writing; and if a contract cannot be clearly and intelligibly extracted from the writing, it may be said that the foundation is wanting on which alone it can rest. In other cases, a contract may be partly in writing and partly in parol; but the design and intent of the statute was, in the cases specified, to compel parties to put their agreement in writing; and, if they have failed to express what they meant, it is at least doubtful if the defect can be aided by a resort to parol proof. The writing was designed to be the evidence of the contract, and the strong leaning of the authorities is, that it must clearly appear by the writing what the parties agreed to do; that it must show a valid and binding contract entered into which can be enforced, and that in that respect it cannot be aided, assisted, or helped out by parol proof. *Boydell* v. *Drummond*, 11 East, 160; *Chuan* v. *Cooke*, 1 Sch. & Lef. 22; *Rose* v. *Cunningham*, 11 Ves. 550; *Elmore* v. *Kingsgate*, 5 B. & C. 583; *Acebal* v. *Levy*, 10 Bing. 376; *Lord Ormond* v. *Anderson*, 2 B. & B. 368; *Hind* v. *Whithouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 2 B. & C. 948; *Seagood* v. *Meale*, Prec. Chy. 560; *Peltier* v. *Collins*, 3 Wend. 465; *Bailey* v. *Ogden*, 3 Johns. 418; *Weightman* v. *Caldwell*, 4 Wheat. 85. I do not mean to express my full assent to this view of the construction of the Statute of Frauds, as I am strongly inclined to think that the design and object of the statute does not demand so strict and rigid an interpretation. Nor am I prepared to admit that parol evidence would not be receivable here, to show that the bales of hemp referred to in this written memorandum meant a particular lot, the number or quan-

tity of which was to be ascertained, and that, as thus interpreted, it would not be a sufficient note or memorandum of the contract, within the meaning and intent of the statute; (see *Wildman* v. *Glossop*, 1 Barn. & Ald. 9; *Valpy* v. *Gibson*, 4 Com. Bench, 837; VAN NESS, J., in *Abeel* v. *Radcliffe*, 13 Johns. R. 300; *Blaylen* v. *Bradley*, 12 Ves. 446); but, as the point would require an extended examination, embracing a long review of the authorities, I prefer, therefore, to rest our decision, as to the error of the referee, upon another ground.

Conceding that this was not a note or memorandum under the statute, the evidence in the case fully established an agreement for the sale of 356 bales of jute hemp, upon the terms and conditions stated in the writing, which was afterwards consummated and became a valid contract under the statute, by the delivery and acceptance, by the defendant, of the greater part of the hemp. The evidence establishing such an agreement and partial delivery is, in my judgment, very clear.

Forbes, a broker, whose clerk, Sturges, effected the sale, testified that the defendant told him, about the time of the sale, that he wanted to buy all the jute hemp that was then in New York. Sturges swore that the defendant spoke to him about buying the hemp; that the negotiation was conducted by him; that he made the purchase in two hours; that he saw the hemp in a store in Water-street, before it was sold; that he knew it to be the plaintiff's hemp; that the hemp he sold to the defendant was the lot he saw; that he told the defendant that the plaintiff had such a lot of hemp, and where it was, referring to it as hemp of such a mark and quality in the cellar in Water street; and that the result was, that he bought the lot for him; that the sale note expressed everything except the number of bales and their weight; that they did not put the number in the sale note, because they did not know whether it was 340 or 360 bales; that that was all that was to be ascertained, and the quantity was left to be filled up. He further testified that he saw some of the hemp afterwards in another street, which was said to belong to the Water-street lot; and the defendant's clerk testified that part

of it was kept in Beaver-street, and the balance in the plaintiff's store in Water-street; that the plaintiff had no other lot of hemp at the time the sale was made to the defendant; and that a bill of the hemp, as to quantity and amount, specifying the amount in dollars and cents, was given by him to the defendant, and that the defendant made no objection to the bill. On his further examination he stated, "My impression is so strong that it amounts to a conviction, that, shortly after the sale, I gave Darragh a bill of parcels of this purchase, giving the amount in dollars and cents, but I would not like to swear to it positively; I cannot be positive enough to swear to the circumstances." He further testified, without objection, to an entry made by him on the plaintiff's books, on the day of the date of the sale note, of a sale of 356 bales, with the marks and weights of the bales, corresponding with the schedule annexed to the complaint, and forming a part of it.

The referee, by his report, finds, among other conclusions of fact, that although the number of bales was not mentioned in the sale note, that the number sold was 356, and that the greater part of it was delivered to the defendant in such parcels as he required, either for his own use or upon orders given by him on the plaintiff, in favor of purchasers to whom the defendant had sold, between the 23d of August, 1850, and the 27th of January, 1852, and that such parcels were paid for as they were taken away.

Having thus found the facts, he finds, as one of his conclusions of law, that there was not such an acceptance and receipt of part of the hemp contracted to be sold as is required by the statute, in order to charge the defendant in this action as the purchaser of the whole; his other conclusion of law being, that there was no note or memorandum within the meaning of the statute.

I confess myself at a loss to understand upon what ground the referee came to the conclusion that there was not such an acceptance and receipt of part of the hemp contracted to be sold as is required by the statute, unless it was upon the authority of a case to which we are referred in the respondent's points, (*Sey-*

mour v. *Davis*, 2 Sandf. S. C. R. 245), decided in the Superior Court, of which court the learned referee was formerly a member, in which it was held that a delivery and acceptance of part of the goods agreed to be sold must, within the meaning of the statute, take place *at the time of the making of the contract.* That if there is a delivery of a part afterwards, it will not reanimate the previous void agreement, but constitutes a separate and distinct contract, upon which an action may be maintained for the price of what has been delivered. This decision was founded in a mistake. The late Mr. Justice SANDFORD, in support of the conclusion arrived at, delivered an elaborate opinion reviewing the English cases, as well as the authorities in this State down to the time of the Revised Statutes, but, by a singular oversight, the court omitted to look into the Revised Statutes, where they would have found that a material change had been made in that portion of the Statute of Frauds relating to the sale of goods, the revisers having introduced a provision in respect to time, but confining it to the payment of part of the purchase money, which must be made at the time of making of the contract. The statute, as thus altered, received a judicial construction by the Supreme Court in *Sprague* v. *Blake*, (20 Wend. 61), in which it was held, ten years before this decision in the Superior Court, that a *subsequent* acceptance in whole or in part of the article agreed to be sold, rendered the contract valid,—which was an authority binding upon the Superior Court when *Seymour* v. *Davis* was decided; and any question upon this point was finally put at rest by the decision of the Court of Appeals in *McKnight* v. *Dunlop*, (1 Seld. 537), in which it was expressly held that a verbal agreement for the sale of personal property exceeding fifty dollars, is valid if a part of the property has been delivered to the purchaser and accepted by him in pursuance of the agreement, although such delivery and acceptance took place several months after the making of the verbal agreement. The verbal agreement in that case was made in June for the sale of 5,000 bushels of malt, 1400 bushels of which were delivered and accepted in the months of August and September next following. Upon the authority of *McKnight* v. *Dun-*

lop, therefore, the delivery and acceptance of a large part of the hemp between the 23d of August, 1850, and the 27th of January, 1852, rendered the verbal agreement for the sale of the whole a valid and binding contract under the statute.

The referee found that it was not proved that the defendant had given the plaintiff any special authority to sell the damaged bales on his account, and that there was no evidence that he, the plaintiff, had given the defendant notice of his intention to sell them. The evidence reported by him, shows that the testimony in respect to a general authority to sell was explicit and uncontradicted. The plaintiff's clerk, Hanfield, testified that the defendant "ordered us to sell the jute for him as much as we could, and I did so;" and, again, "I am perfectly certain that we were authorized by Mr. Darragh to sell the hemp for him; he wished me over and over again to sell it for him, and would ask me if I had done so; my impression is that I reported to him the sales we made, but cannot say. I saw Darragh long before the sale of the damaged bales; had conversations with him about the damage near that time. * * I don't know that he ever gave me any directions with regard to that particular parcel. After the hemp was all sold, I gave Darragh an account of the transaction. * * I recollect that he objected to the damage." It is very clear, from this testimony, that a general authority was given by the defendant to the plaintiff's clerk to sell as much of the hemp as he could, without any reservation as to the bales that were damaged, which were thirty-three in number. The damage to these bales was not shown to have occurred through any negligence on the part of the plaintiff. It was damaged by dry rot, supposed to have been occasioned by the absorption of moisture from the floor of the place where it was stored, though it was on high ground, and the floor was dry when the hemp was placed on it.

The extent of the defendant's liability was not gone into by the referee; for, having arrived at the conclusion that there was no contract for the sale of the 356 bales, all other questions in the case became immaterial. As the report must be set aside, it would be better, perhaps, that we should not express any opinion

as to the amount which the plaintiff was entitled to recover upon the evidence; for, as there must be a rehearing, testimony may be introduced which may materially affect that question. It is enough for us to say that upon the evidence, as it now stands, the plaintiff was entitled to recover, and that for that reason the report must be set aside.

Judgment reversed, and new trial ordered.

JAMES GREEN *v.* THE MAYOR, ALDERMEN, AND COMMONALTY OF THE CITY OF NEW YORK.

An act of the legislature increasing the salaries of the justices of the district courts of the city of New York creates a valid and binding obligation upon the corporation to pay the increased rate, although no power is in terms conferred by the act to create a fund to meet such increase.

Where a power is given by statute, everything necessary to make it effectual, or to attain the end contemplated, is implied.

An action may be maintained against the corporation of the city of New York to enforce, by judgment and execution, the payment of a legal obligation or liability imposed upon or incurred by it, although no fund or property has been appropriated by law to meet such payment.

The provisions of the city charters of 1830, 1849 and 1857, prohibiting the drawing of any money from the treasury until it has been duly appropriated to the purpose for which it is drawn; also the tax law of 1857, restricting the application of the moneys authorized to be raised by tax, to the objects therein specified; were only designed as a protection against usurpations, improvidences, or dishonesty of corporation officials, and were not intended to prevent the operation of any subsequent act of the legislature.

The tax law of 1857 having authorized a certain sum to be levied for specified purposes, "and for such other expenses as the mayor, &c., of New York may be put to by law," *held*, in an action brought by a justice of a district court whose salary had been subsequently increased by an act of the legislature, that such act imposed such an obligation or expense, and the increased salary might be paid out of any contingent fund provided for, or out of any surplus over the estimated amounts specified in the tax bill as required for a particular purpose.

APPEAL from a judgment of a district court. The facts of the case were, that the plaintiff was a justice of one of the district

courts. His salary, prior to April 13th, 1857, was at the rate of $2,000 per year. At that date the legislature, by statute, (1 Laws of 1857, p. 725, § 68), raised the salary attached to his office to $3,000 per year, providing that it should be payable on the first day of each month out of the city treasury. The present action was brought to recover one month's salary at the increased rate.

The defence was, in substance, that there was no money in the city treasury which could by law be applied to the payment of the plaintiff's claim. In support of the defence the particular facts relied upon are so fully indicated in the points, that it is considered unnecessary to state them here.

The justice rendered judgment for the plaintiff, and the defendants appealed.

A. R. Lawrence, jr., for the appellants.

I. The facts set forth in the answer constitute a perfect defence. 1 Laws of 1857, 707. 1. The respondents are the creatures of statute, and can only act in the manner prescribed thereby. *Boon* v. *City of Utica*, 2 Barb. 104; *Head* v. *Providence Ins. Co.*, 2 Cranch, 127; *Dartmouth College* v. *Woodward*, 4 Wheat. 636; *Bank of U. S.* v. *Dandridge*, 12 Ib. 64; *Bank of Augusta* v. *Earl*, 13 Pet. 387; *Hodges* v. *City of Buffalo*, 2 Den. 110; *Hamershaw* v. *Wolverhampton Waterworks Co.*, 4 Engl. L. & Eq. R. 426; *Farmers' L. & T. Co.* v. *Carroll*, 5 Barb. 613. 2. The charter of 1830, (§ 19; Davies' Laws, 202), which was in force until May 1, 1857, prohibited the respondents from borrowing any money, except in anticipation of their annual revenue, unless authorized by a special act; and the charter of 1857, (1 Laws of 1857, p. 885, § 33), which took effect on the 1st day of May, 1857, contains the same prohibition. 3. The tax act of 1857 only authorized the supervisors of the county of New York to raise an amount of money sufficient to pay the salaries of officers, payable out of the city treasury, at the rates allowed by law at that time. 1 Laws of 1857, 159. And section 2 of that act prohibits the application of the sums therein authorized to be raised, to any other objects or purposes than those for which the supervisors are empowered to raise the same.

Clearly, under this act, neither the respondents nor the supervisors can raise any money to pay the appellant the increase in his salary demanded in the complaint. 4. The act of April 13, 1857, (1 Laws of 1857, p. 725, § 60), gives no power to the respondents by loan, or to the supervisors by tax, to raise any amount to meet the increase in the salaries of the justices of the district courts made by that act; and no other acts authorized such loan, or tax; so that the legislature provided no means to enable the respondents to meet the same. 5. The whole revenue of the respondents, derived from other sources than that of taxation, is pledged by law for the permanent debt of the respondents. Davies' Laws, 891. 6. There is no appropriation, nor is there any money in their treasury, out of which they can pay the appellant the increase in his salary. The charters of 1830–1849 provide that no money shall be drawn from the treasury until it has been duly appropriated to the purpose for which it is drawn. Id. 202, § 18; 205–7, §§ 7, 19. And these provisions are continued in force by the charter of 1857. 1 Laws of 1857, p. 884, § 31.

II. A payment of the respondent's demand out of any of the moneys authorized to be raised by the supervisors by the act of March 5, 1857, would subject the officers making the same to the penalties imposed by section 40 of the charter of 1857. 1 Laws of 1857, 888.

III. The inability of the appellants to pay the respondent has not arisen from any neglect of duty on their part, or on that of their officers.

IV. The legislature having neglected to provide the appellants with means to pay the increase in the salary of the respondent, their property cannot now be taken under execution for the satisfaction of such claim.

Wessell S. Smith, for the respondent.

I. It is admitted that the respondent, at the time of the commencement of this action, was a justice of a district court; that his salary, as such, was at the rate of $2,000 per year up to April

13, 1857, when it was increased by an act of the legislature to $3,000 per year. This salary is made payable, on the first day of each and every month, out of the city treasury, and took effect immediately. 1 Laws of 1857, p. 725, § 68. It follows that the respondent was entitled to the salary provided by law, viz., at the rate of $2,000 per year up to 13th April, 1857, and after that at the rate of $3,000 per year, payable monthly, as demanded in the complaint; and, being thus entitled, he has a remedy by action if payment is refused, and no other. *Lynch* v. *Mayor*, 25 Wend. 680, and cases cited.

II. That the legislature had the authority to pass this act increasing the salaries of these justices, and making the same payable out of the city treasury, is not disputed. *People* v. *Warner*, 7 Hill, 81, 82; *S. C.* in error, 2 Denio, 272, 281; *Conner* v. *Mayor*, 1 Seld. 285, 296.

III. But admitting that the comptroller made the estimate; that the common council passed the ordinances and resolution, and the legislature passed the tax bill, as stated in the answer; then we say, 1, We are to be governed by the act of the legislature alone, and have a right to refer to it on this appeal as to what was intended, without regard to averments in the answer as to its construction, and for the obvious reason, 2, That neither the estimate of the comptroller, nor the ordinance of the common council, are binding on the legislature, for the common council may alter the estimate of the comptroller, as has been done recently, and the legislature may alter the estimate of the common council, or refuse to pass them entirely; 3, It follows that, as the act of the legislature was binding, we cannot go behind it to see upon what basis the estimates were made.

IV. It appears, upon the face of the answer, that it is not true that no appropriation has been made, out of which the claim of the respondent could be paid. 1. There is the appropriation of $412,500, which is general, to pay salaries from the city treasury, without any reference to the estimates of the comptroller, and it is not pretended that this sum was exhausted. Until that was done, this allegation forms no defence. Ordinances 1856; 1 Laws

1857, 159. 2. Then there are the items of county and city contingencies, $80,000, which were intended to apply to just such a case as the present. Ib.; *Sun Mutual Ins. Co.* v. *Mayor, &c.*, 3 Sandf. 10, 14. 3. Then comes the provision, that in addition to the items mentioned in the ordinances, "And for such other expenses as the mayor, aldermen, &c., may be put to by law." Ib. 4. It therefore appears that the necessary appropriation has been made. It is virtually admitted it has been received; and there is nothing to show but that the money is in the treasury now: certainly there is no allegation that it has been exhausted.

V. The allegation that the defendants are not authorized to raise the same by loan, is equally unfounded. 1. They are authorized to raise the same by loan, in anticipation of revenue, without permission of the legislature. Laws 1830, p. 128, §§ 18, 19; 1857, p. 884, §§ 31–33. 2. There is nothing in the answer to show that the defendants had no revenue, and that they could not make a loan in anticipation thereof; on the contrary, it appears that they have revenue; and we instance, in addition, fees, &c., received from these courts. Webster's Dict.; Wharton's Law Lex.; Bouvier's Law Dict., tit. Revenue.

VI. They also had authority to raise it by tax under the act of 1857, as above shown. 1 Laws of 1857, 157.

VII. The legislature, by the act reorganizing these courts and giving the increase of salary to the judges, (as they had a perfect right to do), gave the right to the defendants, and imposed on them the duty, to provide the necessary means for the payment thereof. *Stief* v. *Hart*, 1 Comst. 20, 30; 1 Kent's Com. (5th ed.) 464. 1. They had the right to raise this money either by loan or tax, as above shown. 2. The act organizing these courts removes the restriction on defendants, if any was imposed. Laws of 1857, pp. 707, 729, §§ 81, 82. 3. The legislature having imposed upon the defendants the duty of paying this increased salary, they gave them all the authority necessary for the performance of the same. Ib.

VIII. But, admitting the facts stated in the answer, it forms no defence against this claim. 1. The plaintiff was entitled to

the amount claimed for his salary, as provided by law and admitted in his answer; and, if not paid when due, he had a right to his action, and had no other remedy. *Lynch* v. *Mayor*, 25 Wend. 680, and cases cited. 2. No restrictions are contained in the charter, or laws which have been adopted since, altering the principles of that decision. 3. No omission of the legislature, the common council, or their financial officer, could be any defence against the plaintiff. 4. It is not shown that the real estate, rents, &c., of defendants are pledged by law to the payment of the public debt; but if it was, it is no defence, because, in such case the judgment of the plaintiff would be a lien subordinate to the rights of the public creditor.

IX. The act of April 18, 1857, is not obnoxious to the objection that it is a local or private act, and contains more than one subject not embraced in its title, and therefore unconstitutional Const., art. 3, § 13; 1 Laws 1857, 707; 5 Sandf. 10; 1 Seld. 285, 293–7; 15 Barb. 657; Deb. on Const., Atlas ed. 176, Arg. ed. 134.

X. If the judgment is reversed, it presents this curious anomaly: 1. The plaintiff is entitled to his claim as demanded. 2. That he had a right to bring this action for the same against the defendants, who are liable; and which was his only remedy. 3. Yet he is turned out of court, and made to pay a bill of costs, because the legislature, or common council, have omitted something they should have done, but over which he had no control.

By the Court, BRADY, J.—In this case, the theory of the defence is, that the corporation, having no funds to pay the plaintiff's claim, and no power to raise it *in præsenti*, they are not liable. That the legislature has imposed upon them a pecuniary obligation without giving them the means of discharging it, and that compulsory process should not, therefore, be issued against them.

The power of the legislature to increase the salaries of the justices of the district courts was not questioned on the argument. It could not well be. *People* v. *Warner*, 7 Hill, 81, 82; *S. C.* in error, 2 Denio, 272, 281; *Conner* v. *The Mayor*, 1 Sel. 285, 296. The act, therefore, providing for such increase was

valid, and the obligation imposed on the defendants binding. Having arrived at this result, the question which presents itself is whether, in answer to the obligation thus imposed and sought to be enforced, the defendants have presented a legal defence? I think not. Assuming the fact to be as alleged in the answer, that the defendants had no fund out of which the increase could be paid; and admitting that the act increasing the salary did not, by its own terms, confer any power to create a fund to meet such increase, that fact does not discharge the defendants *from liability*. When a power is given by statute, everything necessary to make it effectual, or requisite to attain the end, is implied. *Stief* v. *Hart*, 1 Com. 30; 1 Kent. Com. (5th ed.) 464. So, where the law commands a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. *Foliamb's case*, 5 Coke, 116. The defendants, however, say that, by the charter of 1857 (Laws 1857, Vol. 1, p. 885,) they are prohibited from borrowing any money, except in anticipation of the revenue of the year in which such loan shall be made, unless authorized by a special act of the legislature. That the tax bill of 1857 (Laws 1857, Vol. 1, p. 59,) only authorized the supervisors of the county of New York to raise an amount of money for salaries, sufficient to pay the salaries of officers payable out of the city treasury, *at the rates allowed* by law at the time of the passage of the act, and which did not embrace the increased salary of the plaintiff; that the second section of the tax bill (*supra*) prohibited the application of the sums thereby to be raised, to any other objects or purposes than those for which the supervisors were empowered to raise the same; that the whole revenue of the defendants, derived from other sources than that of *taxation*, is pledged by law for their permanent debt; (Davies' Laws, 891); that the charters of 1830–1849 provide that no money shall be drawn from the treasury until it has been duly appropriated to the purpose for which it is drawn; (Davies' Laws, pp. 202, 205, 207); that these provisions are continued in force by the charter of 1857, (§ 31), and that a payment by the defendants, out of the moneys authorized to be

raised by the supervisors by act of March, 1857, would subject the officers making the same to the penalties imposed by sec. 40 of the charter of 1857. This presents an array of statutes in supposed opposition to the right of the plaintiff to insist upon his salary; but I think they can have no such effect. They were all designed to protect the people of the city and county of New York from the usurpations, improvidences, or dishonesty of officers of the corporation who might feel disposed to be derelict, and for no other purpose. They are guards thrown around the property of the people, but never were designed or intended to prevent the operation of a subsequent statute, passed, it must be presumed, with full knowledge of their existence and purposes. The legislature having the power, then, to increase the salaries of the justices, and thus to impose upon the defendants a burden, and having done so, all the elements exist which entitle the plaintiff to judgment. The defendants' liability is fixed by competent authority, and they are subject to the ordinary modes of having legal liabilities enforced. *The People, &c.*, v. *The Mayor, &c.*, 25 Wend. 680. I am aware that Judge INGRAHAM has expressed a different view of this question; but, although I entertain profound respect for his opinion, I am constrained to differ from him. I think the liability of the defendants beyond question, and that they are subject to all the legal consequences of that liability. It may be said, perhaps with propriety, that the defendants, though liable, are powerless, and that the plaintiff should be restrained from enforcing his judgment until the time arrives at which they can provide for the emergency by the usual estimate and tax bill, but we are not called upon to decide such a proposition, or to give it consideration.

The conclusion thus expressed is predicated upon the truth of the averment, that the defendants have no funds out of which the plaintiff's claim can be paid, and no power to raise money for that purpose. Is this true? On reference to tax bill of 1857, (*supra*), authorizing the supervisors to raise money by tax, it will be perceived that there are two items for contingencies—one for the county of $80,000, and one for the city of $40,000,

and that these form a part of the sum of $3,612,682 to be levied not only for the objects and purposes enumerated, but for "such other expenses as the mayor, aldermen, and commonalty of the city of New York may be put to by law." And it appears, by the defendants' answer, that the items of the bill compose an estimate of the probable amount of tax required for that year, and furnished by the comptroller of the city of New York, as required by ordinance of May 30, 1849. The defendants do not aver that they have no property out of which the plaintiff's claim could be made, but, reposing upon the disabilities created by the statutes mentioned, say, that they have no money in the treasury out of which they are authorized to pay. They do not allege that the county and city contingencies are either exhausted or will be required for purposes other than salaries; they assume that the sum of $412,500, levied for salaries, and which will be required for that purpose, without reference to the increase of the salaries of the justices, is the only fund appropriated which can be touched to pay the plaintiff's claim. We have seen that the tax bill of 1857 appropriates the sum of $3,612,682 to the payment of certain sums, estimated to be necessary for certain purposes, and also for such other expenses as the defendants may be put to by law; and we have also seen that the increased salary of the plaintiff was an expense to which the defendants were put by law. Can there be a doubt that the act of the legislature, increasing the plaintiff's salary, is an appropriation of the defendants' funds for that purpose, or that the defendants, under the general power to pay "such other expenses as they may be put to by law," would have the power out of any contingent fund, or any surplus over the estimates, to pay the plaintiff? I think clearly not; and that there is no such contingent fund, and that there was or would be no such surplus, does not appear. It is my opinion, for these reasons, that the averment of the defendants, that they have no fund out of which they are authorized to pay the plaintiff, is not sustained, and that the judgment, on that ground, as well as upon the question first considered, should be affirmed. Judgment affirmed.

CHARLES F. WATTS *v.* JAMES C. WILLETT, SHERIFF, &c.

The official return, by a constable, of proceedings under an attachment issued by a justice of the Marine Court under the non-imprisonment act, should specify the manner in which the writ has been executed, and, in addition, specifically state whether a copy was or was not personally served on the defendant named in it.

If the defendant cannot be found in the county, then it should show that the constable left a certified copy of the attachment and inventory at the defendant's last place of residence, specifying it.

Where the affidavits, on which the attachment was issued, showed that the defendant resided in the city and county of New York, at No. 54 First street, and the return of the constable stated, that because he could not find the defendant, he left a copy of the attachment and inventory with a person, in whose possession he found the goods and chattels of the defendant, at No. 252 Washington street.

Held, that the attachment was not served in the manner required by statute, and the constable acquired no right to the possession of the property, nor any right of action respecting it.

Such a return will not authorize the plaintiff to proceed to trial upon the return day of the attachment. And although the voluntary appearance of the defendant at that time is sufficient to confer upon the justice jurisdiction to proceed to trial and judgment, that act does not make an incomplete service of the attachment perfect in law, as against executions levied by the sheriff in favor of other creditors.

It is the *service* of the attachment which places goods taken under it in the custody of the law, and creates a valid lien, which a subsequent execution cannot remove.

APPEAL by plaintiff from a judgment of the Marine Court at general term. On or about the 19th day of May, 1856, two attachments against the property of Joseph Crawford were duly issued by and out of the Marine Court of the city of New York to the plaintiff, as constable, one of which attachments was at the suit of Skelding & Thorp, for $279.17, the other at the suit of John Anderson, for $208.85. The affidavits upon which the attachments were issued showed that the defendant, Crawford, resided at No. 54 First street, New York city, and kept a store at No. 252 Washington street, and set forth various facts tending to show that he had made a pretended sale of his stock of goods, and was keeping himself concealed, with intent

to defraud his creditors. These attachments were executed by the plaintiff on the same day that they were issued, and the following return was made by him of his service in each case:

"By virtue of the within attachment I did, on the 19th day of May, 1856, attach and take into my custody the goods and chattels of the defendant within named, and an inventory of which the annexed is a copy; and immediately on the same day, because I could not find the defendant, I left a copy of said attachment and inventory with a person, in whose possession I found the goods and chattels of the defendant, at No. 252 Washington street in the city of New York."

To this return an inventory of the property attached, was annexed.

The attachments were made returnable on the 26th day of May, 1856. On that day the defendant Crawford appeared at court, and judgment was rendered against him. On the 16th, 17th, 19th, 20th, and 21st days of May, 1856, executions at the suit of various creditors of Joseph Crawford were issued to the defendant, the sheriff of the city and county of New York, and were levied by him on the same property thus attached by the plaintiff; the property was sold under these executions, and the proceeds applied to the payment thereof. It was admitted that the property so sold was more than sufficient to pay the attachments, and the executions issued prior to the attachments.

This action was brought to recover the amount of the attachments from the defendant, the sheriff, upon the ground that the attachments constituted a lien upon the property, which the plaintiff was entitled to have satisfied before the executions issued on the 20th and 21st of May. On the trial, the defendant moved to dismiss the complaint on the ground that the attachments were irregularly issued and served, and constituted no lien upon the property. The motion was granted, and the complaint was dismissed. The judgment of dismissal was affirmed at general term, and the plaintiff appealed.

Lewis B. Reed, jr., and *John Sessions*, for the appellant.

I. The judge having jurisdiction to issue the attachment, it follows that the levy was valid; for it was not necessary *service* should precede the *levy;* on the contrary, it must follow. § 36. And any irregularity in the service was cured by the appearance, although by attorney. 9 Barb. 381; 2 R. S. (2d ed.) p. 162, §§ 27, 28, 29; Id., p. 202, §§ 293, 294, 295.

II. The attachment, being warranted by law, created a lien not only against the debtor, but also against subsequent attachments and executions. *Van Loan* v. *Klane*, 10 Johns. 129.

III. Jurisdiction having been acquired, it cannot be lost by mere irregularity; the proceedings may be reversed, but they are not void. Every intendment will be made in favor of regularity, and third parties will not be allowed to inquire into them. 8 Cow. R. 127; 3 Denio R. 168; 2 Hill R. 517; 21 Wend. R. 47.

IV. Presumptions will not be allowed to oust a justice of jurisdiction, (12 Barb. 550); not only is this so, but public officers—a justice, constable, &c.,—are presumed to have done all that the law requires when it appears they have *undertaken* to do a thing. *Van Kirk* v. *Wilde*, 11 Barb. 520.

A. J. Vanderpoel, (*Brown, Hall & Vanderpoel*), for the respondent.

I. The officer did not serve the attachment in the manner required by statute, and obtained no lien upon the property of the debtor, as against the claims of judgment creditors intermediate the levy and the return day of the attachment. The remedy by attachment, where it is jurisdictional process, is only available to a party who strictly complies with all the statutory provisions. 2 R. S. (4th ed.) p. 432, § 29; Id., p. 461, § 213; *Cook* v. *McDoel*, 3 Denio, 317; *Willard* v. *Sperry*, 16 Johns. 121.

a. The plaintiff did not leave a copy of the attachment or inventory, certified or otherwise, at the last place of residence of the defendant. The return does not allege that the defendant did not have a place of residence within the county, nor whether he could not find him within the county. If he can be found

in the county, the attachment must be personally served, and the fact stated. Laws of 1831, p. 404, § 36. *b.* "It is a regular return only that can give jurisdiction." *Stuart* v. *Smith*, 17 Wend. 517; *Wheeler* v. *Lampman*, 14 Johns. R. 481; *Barnes* v. *Harris*, (per BRONSON, J.), 4 Com. 888.

II. The plaintiff's title is not aided by the fact that the defendant in the attachment appeared on the return day. The rights of the sheriff, acquired on the 19th, 20th, and 21st days of May, 1856, could not be impaired by any subsequent acts or waiver on the part of the defendant in the property. The debtor could not, by appearing in court, work a transfer of title, so as to defeat the levy, any more than he could do so by an instrument under his hand and seal. *Homan* v. *Brinckerhoff*, 1 Denio, 184.

III. The sheriff has a right to object to the validity of the plaintiff's levy of the attachments. *Horton* v. *Hendershot*, 1 Hill, 118.

IV. The action for money had and received will not lie, under the circumstances of the present case.

By the Court, HILTON, J.—The material question to be here determined is, whether the attachment issued out of the Marine Court was duly served by the plaintiff, as constable, on the 19th of May, 1856? because, if such was the case, it is conceded that the proceeds of the property attached, and applied to the payment of executions delivered to the defendant, as sheriff, after that day and prior to the 26th of May, were more than sufficient to pay the amount of the judgment recovered in the Marine Court on the return of the attachment. The return of the constable is in the following words, endorsed on the writ:

"By virtue of the within attachment I did, on the 19th day of May, 1856, attach and take into my custody the goods and chattels of the defendant within named, and an inventory of which the annexed is a copy; and immediately on the same day, *because I could not find the defendant*, I left a copy of said attachment and

inventory with a person, in whose possession I found the goods and chattels of the defendant, at No. 252 Washington street in the city of New York."

The 36th section of the Non-imprisonment Act (Laws of 1831, 396; 2 R. S. (4th ed.) p. 461, § 213; also p. 432, § 29,) directs that the attachment shall be executed by the constable to whom it is delivered, by attaching and taking into his custody such of the goods and chattels of the defendant as shall be sufficient to satisfy the plaintiff's demand, immediately making an inventory of the property seized, and leaving a copy of the attachment and of the inventory, certified by him, at *the last place of residence* of the defendant; and if the defendant can be found in the county, such copy shall be served upon him personally, instead of leaving it at his last place of residence. But if the defendant has *no place of residence in the county* where the goods and chattels are attached, and cannot be found therein, such copy and inventory shall be left with the person in whose possession the goods and chattels shall be found.

It appears that the attachment under which the plaintiff claims, was issued against the property of one James Crawford upon the application of one James L. Butler, a creditor, and was founded on the affidavit of Butler and others tending to show that Crawford had made a colorable sale of his property contained in his store and place of business No. 252 Washington street, with intent to defraud his creditors. That after diligent search for him by Butler for 48 hours, by sending and going to his residence No. 54 First street in this city, he had been unable to find him; and Butler's belief was that Crawford kept himself concealed to avoid his creditors, and to avoid service of process. This was sworn to two days prior to the issuing of the attachment.

The facts thus stated rendered the duty of the plaintiff, as constable, in executing the attachment, very plain and simple. After taking the goods and chattels into his possession, and making an inventory thereof, he was to make diligent inquiry for the defendant Crawford, and if he *could not be found* in the county, *then*

leave a certified copy of the inventory and attachment at *his place of residence* No. 54 First street, and in the official return of the proceedings under the attachment he should have specified the manner in which it was executed, and, in addition, specifically stated whether such copy was or was not personally served on the defendant named in it. Laws of 1831, p. 396, § 36.

Now it is quite clear, from the plaintiff's return, that the attachment was not served in the manner required by law, nor was the return sufficient to authorize Butler to proceed to trial before the justice upon the return day of the attachment. Ib., § 38; *Cook* v. *McDoel*, 3 Denio, 317. It is true, the justice acquired jurisdiction to proceed to trial and judgment on that day by the defendant Crawford voluntarily appearing, but that act could not make an incomplete service of the attachment perfect in law as against prior executions, already levied by the defendant in this action, in favor of other creditors. *Horton* v. *Hendershot*, 1 Hill, 118. Although the judgment was valid, yet the plaintiff, as constable, acquired no other right to the property than such as a legal service of the attachment would have given him, (*Homan* v. *Brinkerhoff*, 1 Denio, 184; *Barnes* v. *Harris*, 4 Comst. 374); and, as we have seen the attachment was not served in the manner required by the statute, he acquired no right to the possession of the property, nor any right of action respecting it. It is the *service* of the attachment which places goods taken under it in the custody of the law, and creates a valid lien, which a subsequent execution cannot remove. *Van Loan* v. *Klane*, 10 John. 129.

Judgment affirmed.

THE NEW YORK ACADEMY OF MUSIC *v.* JAMES H. HACKETT.

To work a forfeiture of a lease for the non-payment of rent, a demand must be made upon the demised premises, at a convenient time before sundown, on the day the rent falls due; and the exact amount must be demanded.

The tenant, in such a case, has until midnight to pay the rent, and until the whole day has actually expired, the landlord cannot put in force his right to re-enter.

Forfeitures of this description are not favored in the law, and therefore, when it is insisted on, a demand of rent due must be shown with great particularity.

A denial in an answer, in an action brought to recover rent, of "each and every allegation in the complaint, wherein and whereby the defendant is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them," puts at issue an averment in the complaint "that the rent was, as it became due, duly demanded." HILTON, J., *dissenting.*

An entry by the landlord upon demised premises, and excluding the tenant therefrom, is an eviction of the tenant, and suspends the payment of any rent falling due thereafter, until he is restored to the possession.

But an eviction will not discharge the tenant from liability for rent previously due.

An opera house was rented for two months, the rent to be paid weekly, and "non-payment of rent to forfeit lease." The house was to be accepted in the condition in which it was—the owners, however, agreeing to use all diligence in finishing it. The tenant entered into occupation of the premises, using them for operatic performances, in which Grisi and Mario were the prominent attractions. The building remaining unfinished, with but six furnaces put up out of the fifteen contemplated; Mario was taken with a cold and hoarseness which prevented a continuance of his performances, resulting in an illness from which he did not recover for several weeks. The rent being unpaid for *two* weeks, on the last day of the *third* week the landlord peaceably excluded the tenant from the premises. On the day of the eviction the tenant had announced the first representation of the opera of "Semiramide" on the ensuing week, and had incurred expense in advertising, printing, &c., therefor. In an an action on the lease, brought to recover for the *three* weeks' rent—*Held*,

I. That, upon the tenant showing a breach of the agreement on the part of the landlord to use all diligence in finishing the house, he was entitled to counter-claim his damages in consequence.

II. That the damages claimed to have resulted from the loss of Mario's services by illness arising from cold and hoarseness produced by the unfinished condition of the house, and in respect to which the gains or profits must of necessity be purely speculative and conjectural, were too remote and uncertain to form the subject of a counter claim, and could not therefore be allowed. BRADY, J., *dissenting.*

III. Damages recoverable upon a breach of contract are only such as can be ascertained and fixed with reasonable certainty; and this cannot be done in respect to profits anticipated from the future public performances of a vocalist.

IV. That he was entitled to be allowed, in abatement of the rent, the damages occasioned by the eviction—and which, in this case, consisted of the expenses of advertisements, printing, &c., in announcing the performances of the week following the eviction.

Per HILTON, J., (and INGRAHAM, F. J.)—In an action for rent, against a tenant occupying demised premises, he cannot be permitted to claim, in abatement or extinguishment of the rent, that the premises were unfit for habitation, or for the purposes intended by him at the time of hiring.

APPEAL by defendant from an order at special term refusing a motion for a new trial.

This action was brought to recover three weeks' rent under the following agreement:

MEMORANDUM of an agreement between the New York Academy of Music and James H. Hackett, for a lease of the Academy for a period of two months from the first day of October, one thousand eight hundred and fifty-four.

1. The rent to be nine thousand five hundred dollars—five hundred dollars payable on the thirtieth day of September, and one thousand dollars on the succeeding Saturday of each week until the whole amount is paid.

2. Two hundred free admissions, with a seat selected and secured, reserved to the Academy.

3. The use of a room for directors.

4. The right of having one or more watchmen or firemen in the building with free access to all parts, and control of the fire plugs, cistern, outlets, hose and necessary adjuncts; also a lodging room.

5. Free access to the building for directors or executive committee.

6. Mr. Hackett not to let or underlet any portion of the building, except saloons; and not to assign his lease.

7. The house to be accepted in the condition in which it is. The directors, however, to use all diligence in finishing, and to have the main saloon cleared up on the night of every performance.

8. Mr. Allegri to have use and control of the painting room and carpenters' shop until his contract is finished; other parts of the building to be in the control, during the day, of the necessary mechanics.

9. The building to be used for operatic performances, oratorios, concerts of a classic character, English and French comedies or vaudevilles, ballets and balls of a respectable character.

10. Non-payment of rent to forfeit lease.

11. No scenery to be altered or repainted except by or under the direction of Mr. Allegri, without consent of the executive committee.

12. The Academy reserves the right of increasing the free admissions to three hundred on payment, by a deduction from the rent, of the price of admission to the lessee.

13. In case of fire, the rent to cease unless forthwith repaired.

Dated New York, 27th September, 1854.

WM. H. PAINE, Sec'y.
JAS. H. HACKETT.

C. BAINBRIDGE SMITH.

The complaint averred that the rent due on the 21st and 28th of October, and on the 4th of November, amounting in all to $3,000, was unpaid, "though payment thereof, as it became due, was duly demanded of said defendant."

The answer averred—I. That the plaintiffs failed to use due diligence in completing the building according to their contract, in consequence of which M. Mario, one of the defendant's artists, was made sick and the defendant was incapacitated from giving the necessary operatic representations to his damage $3,000; II. That on the 4th of November he was evicted by the plaintiffs; III. That in consequence of such eviction he was prevented from giving operatic representations, to his damage; IV. That the plaintiffs were indebted to him on a sale of some tickets, and also for some scenery, &c., which they had unlawfully converted to their own use; and the answer closed with this averment: V. "And the defendant denies each and every allegation of the complaint wherein and whereby he is charged with being liable for any rent to the plaintiffs, or of any sum being due or owing from him to them, and demands judgment in his favor against the plaintiffs in the sum of five thousand dollars."

To this answer a reply was interposed, denying all the allegations therein contained except that in respect to the sale of the tickets, on account of which the plaintiffs admitted an indebtedness of $26.

Upon the trial before Hon. D. P. INGRAHAM and a jury, it appeared that on the 4th of November, 1854, William H. Paine, the secretary of the plaintiffs, called at the Academy of Music to collect the rent; that he remained there for that purpose until 6 o'clock P. M., at which time, the defendant having gone away, he gave one James F. Tunison, who was in charge of the Academy on behalf of both parties, direction to close the building and not to permit any person to enter without an order from him or the president of the plaintiffs, Mr. Phalen. This was done by order of the board of directors of the plaintiffs. Mr. Tunison closed the house accordingly. This was on a Saturday night. Mr. Paine at the same time prepared, and left to be served on the defendant, a notice in these words:

JAMES H. HACKETT, ESQ.,

Dear Sir:—You are hereby notified that the unexpired term of your lease of the N. Y. Academy of Music building is forfeited by the non-payment of rent due this day, and that the building is closed.

By order of the directors.

WM. H. PAINE, Sec'y.

New York, Nov. 4th, 1854.

It further appeared that when the defendant first took possession of the house, but three furnaces had been put in; that on the 16th of October there were but six in the house; that both performers and audience complained bitterly of the cold; that Grisi and Mario, who were defendant's principal performers, complained of the cold, and said that they had both sung at St. Petersburgh, but never had experienced such cold there. It was intended to have put fifteen furnaces in all into the house, and the testimony showed that they might all have been put in in two days if a sufficient number of men had been employed.

The defendant then offered to prove that on the evening of the 16th of October, 1854, Mario was well when he commenced his performance at the Academy of Music, and during his perform-

ance was taken with a cold and hoarseness which prevented his going through with his performance; that such cold and hoarseness arose exclusively from the coldness and dampness of the house; and that such coldness and dampness resulted from the neglect of the plaintiffs to finish the building, and to put the furnaces in order, and that Mario's illness continued for about four weeks, during which time the defendant was entirely deprived of his services and lost great gains and profits thereby. The plaintiffs objected to each and all of the foregoing, and the court excluded any testimony upon the same, to which the defendant's counsel excepted.

The defendant then offered to show that a representation was announced for Monday, the 6th of November, viz., "Semiramide," on the Saturday before the closing of the Academy against Mr. Hackett by Mr. Paine, and that great expense had been incurred by bills and advertisements.

The plaintiffs' counsel objected thereto, the court excluded the same, and the defendant duly excepted.

The case being then closed, was submitted to the jury, who rendered a verdict for the plaintiffs for $1,634.13. The defendant then moved at special term on a case for a new trial. The motion was denied, and the following opinion was rendered:

INGRAHAM, First Judge.—The evidence offered by the defendant to show the damages he has sustained by the closing of the Academy, was intended to prove that during the performance previous thereto, Mario, one of the performers, was taken with a cold and hoarseness, which prevented him from performing, which resulted from the neglect of the plaintiffs to make the necessary provision for warming the building; that his sickness continued for four weeks, and in consequence thereof the defendant sustained loss of gains and profits he expected.

This evidence was excluded on the ground of its uncertainty and remoteness. I see no reason to change the opinion expressed at the trial. The damage supposed to arise from such a case is *altogether too remote and uncertain*, both as to the cause, the na-

ture and the consequences, to warrant the court in admitting it after the defendant had seen fit to use the building for the purpose for which it was rented.

When a building is unfit for the use contemplated, if the tenant has a remedy for such unfitness he must seek it either by charging the landlord with the expense of remedying the defects, or by refusing to use the premises, and thereby exonerate himself from liability under the contract of hiring. But a tenant has no right to use demised premises, which he knows to be unfit for occupation, in such a way as to cause damage and loss, and then seek to recover from his landlord for the damages so occasioned by his own acts, was held by us in this court some years since in *Nichol* v. *Dusenbury*, where the tenant, knowing that the roof of a house he had hired was unfinished and permitted the rain to come through, instead of repairing the roof, placed his goods in the store, which were there damaged by the rain. The court held the tenant could not recover such damage.

The rule is the same whether the damage is produced by water on goods or by exposure to cold, either in property or person. If the building is unfit for the purpose contemplated, then the tenant should not use it, and should seek redress in another form.

The mere notice to the tenant was not an eviction, and the evidence does not show any actual eviction prior to the time when by the contract the lease was to terminate.

The matters offered by the defendant, and which were excluded, relating to the supposed damages sustained by him, were not, in my judgment, admissible for that purpose, and the rulings in regard to them were not erroneous.

Motion for new trial refused.

From the order entered pursuant to this opinion, the defendant appealed.

C. Bainbridge Smith, for the appellant.

I. In order to produce an eviction, it is not necessary there should be an actual physical expulsion. *Pendleton* v. *Dyott*, 8 Cow.

727; *Gilhooley* v. *Washington*, 4 Comst. 217; *Luckey* v. *Frantzke*, 1 E. D. Smith, 47; *Lawrence* v. *French*, 25 Wend. 443; *Ogilvie* v. *Hull*, 5 Hill, 52; *Lloyd* v. *Tompkins*, 1 T. R. 671; *Burns* v. *Phelps*, 1 Stark. 94. 1. An eviction consists in taking from the tenant the whole or some part of the demised premises. Id. So, in *Burns* v. *Phelps*, (*supra*), where the landlord gave notice to an under tenant to quit, and he did accordingly, it was held to amount to an eviction. So in *Lloyd* v. *Tompkins*, (*supra*), per ASHURST: "But here the act itself asserts a title; *for the defendant locked the pew, which is as strong an assertion of right* as can well be imagined." 2. The defendant had the whole of the 4th of November, that is, till 12 o'clock midnight of that day, in which to pay the rent due. *Giles* v. *Comstock*, 4 Comst. 270, 273; *Smith* v. *Shepard*, 15 Pick. 147; *Duppa* v. *Mayo*, 1 Saund. 287. 3. The plaintiffs did not make any formal demand of the precise sum due for rent, before they entered the premises and evicted the defendant therefrom. Taylor's Land. and Ten., § 297, and cases cited; *Jones* v. *Kip*, 3 Wend. 231. 4. A wrongful eviction of the tenant by the land lord, of the whole or part of the demised premises, suspends the rent. *Christopher* v. *Austin*, 1 Kern. 216; *Giles* v. *Comstock*, 4 Comst. 275. 5. The facts disclosed in the case at bar show an ouster—an actual physical expulsion of the tenant by the landlord on the 4th of November, 1854, the whole of which day the defendant had to pay the rent.

II. The defendant was unlawfully evicted from the demised premises by the plaintiffs, and he should be allowed such damages as he sustained by reason of the plaintiffs' unlawful acts. 1. An action by the defendant in the nature of the former action of trespass would have lain against the plaintiffs. Taylor's Land. and Ten. (2d ed.) § 785; *Hilary* v. *Gay*, 6 Car. & P. 284, (25 E. C. L. R. 398.) 2. Such eviction being an abuse of an authority in law, makes the entry a trespass *ab initio*, and therefore, if a party ousted bring trespass, the defendant cannot justify the expulsion for want of a lawful possession, and whether the entry was forcible or not is a question for the jury. *Newton* v. *Howland*, 1 Scott N. R. 491; 1 M. & Gr. 644, (39 E. C. L. R. 581);

Flaherty v. *Andrews*, 2 E. D. Smith, 529. 3. The defendant offered to prove, that on the Saturday (4th November, 1854) before the closing of the building against the defendant, a representation of the opera of "Semiramide" was announced for the Monday following, and that before and at the time of such expulsion great expenses had been incurred by him for the bills and advertisements. The counsel for the plaintiffs objecting thereto, the court excluded the same, and the defendant excepted. 4. It must be assumed that such proof could be adduced, and that the defendant did sustain the damages attempted to be proved. *a.* The premises were let to the defendant for certain specified purposes, among others that of giving operatic entertainments, in which Mario and Grisi appeared; and that business was being carried on when he was unlawfully evicted by plaintiffs. *b.* Advertising and other expenses incidental to such entertainments had been incurred and lost by reason of the eviction. Such items of damages would be admissible in an action of trespass brought by the defendant against the plaintiffs; and proper by way of recoupment, or in abatement of the plaintiffs' claim in an action arising either from the breach of the plaintiffs' covenant, or their acts which occasioned them. *The Mayor* v. *Mabie*, 3 Kern. 151, 153; Taylor's Land. and Ten. (2d ed.) §§ 373–4, 785; *Driggs* v. *Dwight*, 17 Wend. 71; *Freeman* v. *Clute*, 3 Barb. S. C. R. 424; *Lawrence* v. *Wardell*, 6 Id. 423–6; *Masterton* v. *Mayor of Brooklyn*, 7 Hill, 62; *Waters* v. *Towers*, 20 Eng. L & Eq. R. 410. 5. Such damages are not too remote. Id.

III. The covenant of the plaintiffs is to use all diligence in finishing the house; and this, in connection with the limited term for which the defendant hired it, rendered it incumbent on the plaintiffs to use more than ordinary exertions to fulfill their covenant. Chitty on Contracts, 735, 736; *Crocker* v. *Franklin H. & F. Manufg. Co.*, 3 Sumn. 530; *Kerby* v. *Harrison*, 2 Ohio (N. S.) 396. 1. The defendant offered to prove that, by reason of the plaintiffs violating their covenant to finish the building, he was unable to proceed with the business for which the building was expressly leased to him, and had sustained great los-

and been deprived of the services of those he employed, and of great gains and profits. *Whitbeck* v. *Skinner*, 7 Hill, 53. 2. What such losses were, or how and in what manner the defendant was damnified and deprived of making great gains and profits, the court refused to let the defendant prove, and to which the defendant excepted. 3. The plaintiffs let the premises in question for a particular purpose, and restricted him by the lease to such purpose; and the sole question is, if the defendant was deprived of the use of the premises by reason of the non-fulfillment of the contract on the part of the plaintiffs, and sustained damages thereby, whether he is remediless? *a.* Such damages might be merely the value of the premises, irrespective of what the defendant agreed to pay for them. *Driggs* v. *Dwight*, 17 Wend. R. 71; *Trull* v. *Granger*, 4 Seld. R. 115. *b.* They might consist of the services of those persons whom the defendant was under contract to pay, and of whose services he was deprived by the acts of the plaintiffs. *c.* They might consist of the expenses of preparing the opera "Semiramide." *d.* The court could not correctly hold that the testimony was inadmissible, or the damages too remote, until it was ascertained what they consisted of. But at all events the defendant was entitled, as damages, to any expense he had actually incurred in his business, as a consequence of the failure of the plaintiffs in not performing their covenant. *Driggs* v. *Dwight*, 17 Wend. 71; *Whitbeck* v. *Skinner*, 7 Hill, 53; *Freeman* v. *Clute*, 3 Barb. S. C. R. 424; *Lawrence* v. *Wardell*, 6 Id. 423-6; *Masterton* v. *The Mayor*, &c., 7 Hill R. 62: *Waters* v. *Towers*, 20 Eng. Law & E. R. 410; *Fisher* v. *Barrett*, 4 Cush. 381. *e.* Such damages may be set up in abatement of the plaintiffs' claim. Id.; *The Mayor*, &c. v. *Mabie*, 3 Kern. 151.

F. A. Lane, for the respondents.

I. The justice who tried the cause did right in excluding any testimony in regard to the illness of Mario. *a.* Every set-off must arise upon contract, or be connected with the subject matter of the transaction. The illness of Mario was neither of these. Code, § 150; *Cram* v. *Dresser*, 2 Sand. Sup. Ct. Rep. 120. *b.* Such

a set-off is too remote and contingent. *c.* The offer of defendant's counsel to show that Mario's cold and hoarseness arose exclusively from the coldness and dampness of the house, was an offer to show an impossibility—for what physician so astute as to know that the seeds of the disease were not about him before he went to the building.

II. The fact that the Academy of Music was too cold for operatic performances, or even was entirely unfitted for such performances, would in itself have given no right of set-off or recoupement to the defendant. *a.* The house was to be accepted in the condition in which it was. *b.* Even where a building is let for a special purpose, and its use or occupation for any other is prohibited, there is no implied contract or warranty on the part of the landlord that the building shall be, or continue, fit for the purpose for which it is demised. *Howard* v. *Doolittle*, 3 Duer, 464, and cases there cited. *c.* Nor, if the building ceases to be habitable, or is wholly destroyed, is the tenant discharged from the payment of the whole or any part of the rent. He can only be so by express agreement. *Howard* v. *Doolittle*, cited above.

III. The justice did right in refusing to charge that there was an eviction on the 4th of November, 1854. *a.* To constitute an eviction, there must be some deliberate interference on the part of the landlord with the possession, depriving the tenant of the beneficial enjoyment of the demised premises. Words or directions to employees amount to nothing. The *act* must be done. *Ogilvie* v. *Hull*, 5 Hill, 52; *Bennett* v. *Bittle*, 4 Rawle, 343. *b.* The evidence shows that the person who had charge of the building during the whole time defendant occupied, did not close the building until after the defendant had left the building for the night. *c.* The evidence shows no interference with the defendant's possession until Sunday morning, November 5th, 1854, and nothing then amounting to an eviction.

IV. The rent, for which action is brought, had accrued *previous* to any eviction, and therefore such eviction (if there was any) cannot be set up as an extinguishment. *a.* The landlord,

after he has re-entered for a forfeiture of the lease, may recover the rent which accrued previous to such forfeiture in an action for debt, or in an action upon the covenants in the lease. *Stuyvesant* v. *Davis*, 9 Paige, 427; see, also, 2 Greenleaf's Cruise, 103; *Giles* v. *Comstock*, 4 Com. 275; *Remem* v. *Smith*, 1 Smith's Ct. Appeals, 332. *b.* Non-payment of rent forfeited the lease, and the plaintiffs had a right (if they chose) to prevent the defendant from entering on Sunday morning, inasmuch as the lease was forfeited.

V. The justice did right in excluding all testimony in reference to the opera "Semiramide," and all matters connected therewith, and also all testimony as to damages by reason of the non-performance. *a.* Any damages which might have arisen thereunder are too remote and contingent to be made the subject of set-off. *Trull* v. *Granger*, 4 Selden, 115. *b.* The measure of damages is the difference between the rent reserved and the value of the premises for the term, and this measure is the same whether the action be on contract or in tort. *Hull* v. *Granger*, cited above; *Kelly* v. *The Dutch Church of Schenectady*, 2 Hill, 105; *Kinney* v. *Watts*, 14 Wend. 38; *Mout* v. *Johnson*, 1 Hill, 99.

VI. The directors used all reasonable diligence in finishing, and this was all they were required to do.

BRADY, J.—The testimony does not show that any demand for the rent was made. It is alleged in the complaint that the rent which accrued on the 21st and 28th days of October, and the 4th of November, 1854, as it became due, was duly demanded, but it is admitted in the reply that $26 should be deducted from the rent claimed in the complaint. It does not appear at what time of the days, on which the rent fell due, it was demanded; but it appears that on the 4th of November, 1854, and at about 6 P. M. of that day, Mr. Paine, who was acting on behalf of the directors of the Academy of Music, directed Mr. Tunison to close the building, and not to permit any person to enter it without an order from Mr. Phalen, the president of the Academy, or himself. And it further appears that Mr. Tuni-

son acted according to orders—locked the doors, and did not allow any person to enter. From this statement of the evidence it is apparent that on the 4th of November, 1854, and at about 6 P. M., the plaintiffs took possession of the building with the intention of excluding the defendant therefrom, and that their orders to that effect and purpose were carried out. The agreement contained a provision, as follows: "Non-payment of rent to forfeit lease;" but it is well settled that, on leases containing a similar covenant, agreement, or condition, the landlord's right to re-enter is not perfected until he makes a demand of the precise sum due for rent at the time and place required by law. The demand must be made on the premises on the day it falls due, at a convenient time before sundown. *Jackson* v. *Harrison*, 17 John. 70; *Fabian and Windsor's case*, 1 Leon. 305; *S. C.*, Cro. Eliz. 209; *Kidwelly* v. *Brand*, Cro. Eliz. 48; *Crop* v. *Hambledon*, 4 Leon. 180; *Jackson* v. *Kipp*, 3 Wend. 230; *Van Rensselaer* v. *Jewett*, 5 Denio, 121; *Jones* v. *Reed*, 15 N. H. 68.

The allegation in the complaint of the demand does not show a compliance with the law, because it appears that the precise sum due was not demanded. The defendant, under the agreement, was entitled to a credit of $26, as admitted by the reply. But, even if the demand was in all respects complete, the plaintiffs had no right to possession until midnight of the 4th of November. The defendant had the whole day in which to pay the rent, and, until the day expired, could not be disturbed. *Duppa* v. *Mayo*, 1 Saunders, 287; *Kidwelly* v. *Brand*, Cro. Eliz. 73; Co. Lit. 201, b., 202, a.; *Wood and Chevers' case*, 7 Term Rep. 117; *Sweet* v. *Harding*, 4 Washt. (19 Vert.) 587.

Taking possession of the premises was a deliberate interference with the defendant's possession, by which he was deprived of the premises. The eviction was complete, (*Burns* v. *Phelps*, 1 Starkie, 94; *Luckey* v. *Frantzkee*, 1 E. D. Smith, 47; *Ogilvie* v. *Hull*, 5 Hill R. 52; *Pendleton* v. *Dyott*, 8 Cow. 727; *Lloyd* v. *Tompkins*, 1 T. R. 671; *Cohen* v. *Dupont*, 1 Sand. S. C. R. 260; *Jackson* v. *Eddy*, 2 Miss. 209; *Peck* v. *Hiler*, 14 Howard's Pr. R. 155), athough such eviction did not discharge the rent which

had already accrued. *McKeon* v. *Whitney*, 3 Denio, 452. The defendant, however, was entitled to the damages occasioned by such eviction, as a violation of the agreement of hiring, and in abatement of the rent; (*The Mayor, &c.*, v. *Mabie*, 3 Kernan, 151); and his offer to show that a representation was announced for Monday the 6th of November, and that he incurred great expense by bills and advertisements therefor, was improperly rejected. For these reasons, without reference to the other questions in the cause, a new trial must be ordered. It may be necessary, however, to consider the admissibility of evidence to show that Mario was taken sick in consequence of the plaintiffs' delay in finishing the building after the defendant took possession. The defendant hired the premises for the purpose of giving operatic entertainments, in which Mario and Grisi appeared. They had never sung in this country except under the management of the defendant, who brought them here. In the language of Mr. Paine, the plaintiffs' witness, and the plaintiffs' secretary, the great attraction was Mario and Grisi. The hiring was upon the 27th of September, 1854, and the occupancy was to commence on the 1st of October following. The plaintiffs were to use all diligence in finishing the building, which the defendant agreed to accept in its unfinished state, and this finishing seems to have contemplated the erection of fifteen furnaces for the purpose of heating the house. On the 16th of October the weather was cold, and but six furnaces were in order. Mario and Grisi, and the audience complained of the coldness of the house. Mr. Paine was spoken to about it, and went to the room of Mario and Grisi. They complained that it was bitterly cold; said they had sung in St. Petersburgh, and had never experienced such cold there. It was also proved that a sufficient number of men could have put in the whole fifteen furnaces in two days; and further, that the furnaces were not completed until the 16th of November. There is no conflicting testimony on this subject, and the conclusion is inevitable, on the evidence, that the plaintiffs did not use all diligence to finish the building. The defendant offered, in connection with these facts, to show that, on the

evening of the 16th of October, Mario was well when he commenced his performance, and that during his performance he was taken with a cold and hoarseness, which prevented his going through with his performance; that such cold and hoarseness arose exclusively from the coldness and dampness of the house, and that such *coldness and dampness* resulted from the neglect of the plaintiffs to finish the building and to put the furnaces in order; and that Mario's illness continued for about four weeks, during which time the defendant was entirely deprived of his services, and lost great gains and profits thereby. I think the evidence should have been received. The sickness of Mario was the direct consequence of the neglect of the plaintiffs to finish the building or to erect the furnaces. Such was the offer, and, for the purposes of this appeal, its truth must be assumed. In *Ford* v. *Munroe*, (20 Wend. 210), the action was brought to recover damages for the negligence of the defendant's servant in driving a gig over the plaintiff's son, by which he was killed, and, in addition to loss of service, the plaintiff was permitted to recover the damages occasioned by his wife's *sickness consequent upon the accident.* Justice NELSON said, in that case, that the damages were clearly proved to have been the direct consequence of the principal act complained of, and came within the well settled rule respecting special damage. Damages actually sustained, but which do not necessarily arise from the act complained of, and consequently are not implied by the law, may nevertheless be recovered if properly alleged. *Squier* v. *Gould*, 14 Wend. 159; *Armstrong* v. *Percy*, 5 Wend. 538. The beneficial enjoyment of the plaintiffs' premises, by the defendant, depended upon the ability of the artists employed by him to perform the different parts assigned them, and if that ability was destroyed by the omission of the plaintiffs to keep their engagement, the loss should be borne by them. It seems that the sickness of Mario resulted directly and immediately from the negligence, or want of diligence, on the part of the plaintiffs, and is less remote than the sickness of the plaintiff's wife in *Ford* v. *Munroe, supra.*

I think the judgment should be reversed, and a new trial ordered, with costs to abide the event.

DALY, First Judge.—The averment in the complaint, that the rent falling due on the 21st and 28th of Oct. and 4th of November was, as it became due, duly demanded, was put in issue by the general traverse at the close of the answer. If the plaintiffs, therefore, meant to justify their taking possession of the opera house on the 4th of November upon the ground that they had the right to re-enter for condition broken, it was necessary for them to show that they had made a demand of the rent in the manner required by law, to operate as a forfeiture of the lease, and give the right to re-enter.

Forfeitures of this description are not favored, and to work a forfeiture for the non-payment of rent, the common law requires a previous demand of the rent due, with circumstances of great particularity. The demand must be made upon the demised premises upon the very day when the rent becomes due, before sunset, and the exact sum must be demanded, not a penny more or less;—(cases collected in Archbold's Landlord and Tenant, p. 161, and in Comyn on Landlord and Tenant, 327);—and even where demand is made, the tenant has until midnight to pay it. "The rent is not due," says Chief Justice HALE, (*Duppa* v. *Mayo*, 1 Saund. R. 287,) "until the last minute of the natural day;" and the lessor cannot put his right to re-enter in force until the day has expired. *Maundes' case*, 7 Coke, 28 b.; *Burrough* v. *Taylor*, Cro. Eliz. 462; 1 Wms. Saund. 287 b.

The only evidence, in this case, of a demand was a notice from the secretary of the plaintiffs to the defendant, bearing date the 4th of November, 1854, announcing that "the unexpired term of your lease of the New York Academy of Music building is forfeited by the non-payment of rent due this day, and that the building is closed," which was written by the secretary to be served on the defendant on the 4th of November. There was nothing to show that a demand of rent was ever made before the 4th of November. If made on that day for the exact amount

then due for the three weeks, the plaintiffs would have had a lawful right to enter peaceably and take possession on the 5th, if the defendant had not, before the commencement of the 5th, paid up the whole amount then due; but they had no right to enter on the 4th. The secretary, Mr. Paine, testified that he was on the premises on the 4th of November to demand rent; that he was there until 6 o'clock P. M.; that he directed Mr. Tunison to close the building, and not to permit any person to enter it without an order from him or from the president of the Academy, and that he acted by orders of the directors of the Academy. Tunison accordingly locked up the building, and would not allow Mr. Hacket, or any of his company, to enter that evening. This was very clearly an eviction—a putting out of the tenant—and an entry and resumption of the possession on the part of the landlord, before he was entitled to enter, which operated to suspend the payment of the $1,000 weekly rent, falling due on the 4th of November at midnight, or any rent thereafter, until the defendant was restored to the possession. But, though this wrongful entry and eviction suspended the rent thereafter to grow due, it did not effect, suspend, or release the defendant from the payment of the rent that had already accrued, and was payable on the 21st and 28th of October, in respect to which there had been a full, complete, and undisturbed enjoyment; the rule being well settled that an eviction will not discharge the liability for rent previously due. *Boynton* v. *Bolder*, 2 Ventr. 67; American cases collected in 1 Hilliard's Abridg., chap. xvii, § 1; Comyn on Landlord and Tenant, 524. For these two weeks' rent, due before the eviction took place, amounting to the sum of $2000, the defendant was liable.

It was a part of the written agreement, or lease, that the plaintiffs were to use all diligence in finishing the house. This was an express agreement on their part, and if there was a breach of it, the defendant was entitled to recoup or counter claim his damages arising from the breach, against the plaintiffs' claim for the two weeks' rent. His offer, however, to show that Mario took cold from the coldness and dampness of the house while he was en-

gaged in a performance, in consequence of which the defendant was deprived of the benefit of Mario's services for four weeks, by which he lost great gains and profits, was, I think, properly rejected. It opened a field of inquiry in respect to actual loss, or the amount or extent of it, purely speculative and conjectural, which depended upon contingencies that might or might not happen. If the defendant had had the use of the opera house during these four weeks, and the benefit of Mario's services, innumerable causes might have occurred to interfere with or prevent the realization of profits. The offer in this case was no more than that claimed in *Blanchard* v. *Ely*, (21 Wend. 342), that the jury might take into consideration the loss of profits arising from the delay of a steamboat, and her loss of trips in consequence of the defective nature of her machinery, which the court held could not be gone into as an item of damage, being too uncertain. Damages, recoverable upon a breach of contract, are such as can be ascertained and fixed with reasonable certainty; (*Griffin* v. *Colver*, 16 New York R. 489; *Freeman* v. *Clute*, 3 Barb. S. C. R. 424); and that cannot be done in respect to profits anticipated from the future public performances of a vocalist, any more than it could be done in respect to profits anticipated from the running of a steamboat if she had been in a condition to prosecute her regular trips.

I think otherwise, however, in respect to the offer to show, that when the plaintiffs took possession of the opera house on Saturday the 4th of November, that the defendant had announced a representation of the opera of "Semiramide" for the Monday evening following, and had incurred great expense in bills and advertisements when he was deprived of the house by the act of the plaintiffs. This was an item of damage that could be easily ascertained; and I do not see upon what principle this evidence could be excluded. There was sufficient evidence in the case to warrant the jury in finding that there was a breach of the agreement to use all diligence in finishing the house, and the expense and loss the defendant had been put to, by bills and advertisements, he was entitled to prove, and have deducted

from the plaintiffs' claim for rent. Unless this expense should exceed the sum of one thousand dollars, the defendant will not be greatly benefitted by a new trial. But that is a matter for his consideration. He asks for a new trial upon the ground that this evidence was excluded, and, in my opinion, he is entitled to it; and I therefore agree with Judge BRADY, that a new trial should be ordered.

HILTON, J.—The damages claimed as arising from the illness and inability of Mario to perform were, I think, too remote, and evidence in respect to them was properly excluded. *Griffin* v. *Colver*, 16 N. Y. R. 489. Besides, it is a general rule that a tenant occupying premises cannot, in an action for rent, be permitted to claim that they were unfit for habitation, or for the purposes intended by him at the time of hiring, in abatement or extinguishment of the demand for rent. *Edgerton* v. *Page*, 1 Hilton R. 320; *Moffat* v. *Smith*, 4 Com. 126; *Cleves* v. *Willoughby*, 7 Hill, 90; *Westlake* v. *Degraw*, 25 Wend. 669; *Mumford* v. *Brown*, 6 Cow. 475.

It is admitted by the pleadings that the rent, as it became due, was duly demanded. The action is brought and the recovery is had for rent due, and duly demanded and unpaid. Conceding, then, that the rent due November 4th was not actually due on the afternoon on that day when the defendant was deprived of the possession by the plaintiffs, there still remains the forfeiture arising from the non-payment, and due demand of the rent falling due October 21 and 28, as admitted by the pleadings, which no subsequent acts of the plaintiffs waived; and as the peaceable eviction of the defendant subsequent to this forfeiture was not wrongful, his claim for damages arising out of what took place on November 4th was therefore properly excluded.

Indeed, it would seem that the verdict of the jury was based upon the assumption that the lease had terminated and become forfeited by non-payment of rent on October 21st, as their verdict is only for the amount owing for the two weeks' rent, after de-

ducting the sum claimed on account of new scenery, and what was admitted to be owing for amphitheatre tickets.

I think the order appealed from should be affirmed.

Order appealed from reversed, and new trial granted.

JAMES BOGARDUS *v.* JOHN R. LIVINGSTON.

Where an attorney has appeared for a defendant without authority, the court will not set aside the judgment, but will leave the defendant to his action against the attorney.

If the defendant, however, swears to the merits, the court will allow him to come in and defend, suffering the judgment to stand, that the plaintiff's lien, acquired by the judgment, may be preserved.

But the defendant must apply for relief, in such a case, with due diligence, and, if there is delay, must furnish satisfactory excuse therefor.

The authority of an attorney to appear may be inferred from circumstances—such, for example, as that he was the attorney of the defendant in other matters, and that, at the time of serving the notice of appearance, he informed the defendant that he had done so, and the defendant expressed no objection.

APPEAL from an order at special term denying a motion to vacate a judgment entered by default, and for leave to answer. The affidavit of the defendant showed that no summons was ever served upon him in the action. The judgment was entered upon an appearance by R. E. Mount, jr., as his attorney. The facts in relation to the authority of Mount to act as the defendant's attorney, as they appeared in the affidavits, are fully stated in the opinion of the court.

O. S. A. Peck, for the appellant.

Martin & Smiths, for the respondent.

By the Court, DALY, First Judge.—Where an attorney has appeared for a defendant without authority, the court will not,

unless the attorney is responsible, set aside the judgment, but will leave the defendant to his action against the attorney. If the defendant, however, swears to merits, the court will allow him to come in and defend, suffering the judgment to stand, that the plaintiff's lien, acquired by the judgment, may be preserved. *Denton* v. *Noyes*, 6 John. 296. But this is not a case of an appearance by an attorney without authority.

Mount, the attorney, swears to a state of facts from which he might well assume that he had authority to appear for the defendant. When he served the notice of retainer in this suit, he was, and had been for a long time prior, acting as the attorney and counsel of the defendant in the prosecution and defence of suits, one of which, growing out of the transaction which led to the giving of the note in this suit, was then pending. He swears, to the best of his belief, that, at about the time he served the notice of retainer, he informed the defendant that he had appeared for him, and the defendant does not in his affidavit deny that he had been so informed. Assuming it, then, to be the fact that he was so informed, his expressing no dissent was a recognition of the propriety of the attorney's act, and of his authority to appear for him. This took place in the year 1852. Five years after, the plaintiffs served their complaint, and Mount, considering that his authority had, as he expresses it, "ceased by non-user, or become extinct by age," sent the complaint to the defendant at or about the day when he received it, the receipt of which is not denied by the defendant. This was on the 24th of September, 1857. The defendant took no steps to defend, but suffered the plaintiff to go on and enter up judgment, which he did on the 28th of October following; and it was not until after April, 1858, when an order was made for his examination supplementary to execution, that the defendant took any notice of the plaintiff's proceeding, when he made the present motion to set aside the summons and all subsequent proceedings, setting forth in his affidavit that the summons has not been served upon him; that he has not authorized any attorney of this court to appear for him, and that he has a good defence to the action.

Under the Code, a voluntary appearance by a defendant is equivalent to the personal service of a summons, which was the case here, the defendant having appeared through his attorney, Mount, who, as before suggested, apprised him that he had appeared for him, and whose authority to appear was recognized by the defendant's expressing no dissent. The judgment, therefore, and all proceedings founded upon it, was regular, and there was no ground for setting it aside. The only remaining question is, whether the defendant was entitled to come in and defend upon the merits. I think that, in a case like this, where the defendant suffered six months to elapse after he was apprised, by the service of the complaint, that the plaintiff was proceeding to judgment, without taking any steps to defend, but knowingly suffered the plaintiff to go on to judgment, to issue execution, and institute proceedings supplementary to execution, is one that does not commend itself to the favor of the court. The defendant has given no satisfactory excuse for the delay, and the rule is well settled that a defendant who asks for such relief must apply with due diligence. *Payne* v. *The People*, 6 Johns. 130; *Beekman* v. *Franker*, 3 Car. 95; *Johnson* v. *Clark*, 6 Wend. 517; Graham's Practice (2d ed.) 788.

We should at least be satisfied that we will do injustice if the relief is not granted, and something more is necessary to satisfy ous of that, than putting in a formal affidavit of merits. Order appealed from affirmed.

JOHN HAULENBECK *v.* WRIGHT GILLIES and JAS. W. GILLIES.

Under the law, as it existed prior to the act of April, 1857, relative to the district courts in the city of New York, a non-resident plaintiff might, at his option, sue either by long or by short summons; the only difference being that, in the latter case, he was required to furnish proof of his non-residence and give security.

But by that act the practice was changed. So that now a non-resident plaintiff

must in all cases sue by short summons, and must first furnish proof of his non-residence, and give security for costs. BRADY, J., *dissenting*.

In an action brought in a district court when it appears by the evidence, and the objection is taken *at the trial*, that the plaintiff is a non-resident of the county, and has not given security for the defendant's costs, it is the duty of the justice to dismiss the action without costs, and without prejudice to a new suit. BRADY, J., *dissenting*.

But if the objection is not thus taken, it is considered as waived; and the justice will be deemed to have jurisdiction of the action, although it may have been brought by a non-resident plaintiff by short summons, and without giving security.

Where the judgment of a justice is incomplete—*e. g.*, where the return shows that the complaint was dismissed, but does not show that costs were awarded against the plaintiff, it can neither be reversed nor affirmed, but the appeal therefrom will be dismissed.

APPEAL by plaintiff from a judgment of the Sixth District Court. This action was commenced by a long summons, and no security was given for costs. On the return of the summons the defendant moved for a dismissal of the complaint on this ground. The motion was granted, and the plaintiff appealed. The return did not show that any judgment was perfected for costs or otherwise against the plaintiff, and the defendants move on that ground to dismiss the appeal.

William McKeag, for the appellant.

Luther R. Marsh, for the respondents.

I. The appeal should be dismissed. A judgment of non-suit, where no costs are given against the plaintiff, is not appealable. 2 Johns. R. 8; 2 Cow. Tr. 1031.

II. Whenever a suit is commenced in any court in this state by a plaintiff not residing within the jurisdiction of the court, security for costs must be given. 2 R. S. (4th ed.) 821; Abbott's Forms of Pleadings, 204, note *c*. The evident intent of the legislature, in requiring non-residents to file security for costs, is to protect citizens of this state from vexatious litigation by persons not residing within the jurisdiction of our courts, and to require from the plaintiffs, in such cases, what answers to the ancient pledges of prosecution. 3 Blackstone's Com. 400.

By the Court, HILTON, J.—The plaintiff, a resident of New Jersey, sued the defendants in the Sixth District Court by long summons, and without giving security. The defendants appeared and, these facts being admitted, instead of answering, "moved to dismiss the case" because no security had been filed. The justice, in his return, states that he granted the motion, and from his ruling the plaintiff appealed. Upon the argument, we are asked to dismiss this appeal upon the ground that such a determination, by which no costs are awarded, is not appealable.

Under the law, as it existed prior to the act relative to the district courts in this city, passed April 13, 1857, (see Laws 1857, Vol. 1, p. 707), a non-resident plaintiff might, at his option, sue either by long or short summons; the only difference being that, in the latter case, he was required to furnish proof of his non-residence, and give security. *Nicholls* v. *Tracy*, 1 Sand. S. C. 278; *King* v. *Dowdell*, 2 Id. 131; *Allen* v. *Stone*, 9 Barb. S. C. 61; *Kelly* v. *Kelly*, 2 E. D. Smith, 250. But by the act of 1857, the practice in this respect was changed, as will be seen by an examination of its provisions. By § 13, where the plaintiff is not a resident of the county, and gives the security for costs required by § 23, the summons must be returnable in not less than two nor more than four days from its date. In other words, it must be a short summons. § 23 requires the security, in such cases, to be given before the summons is issued, and § 45 specifies the cases where the justice must render judgment dismissing the action with costs, and without prejudice to a new action. Among the cases there enumerated are those where it is objected at the trial, and appears by the evidence, that the action is brought by a plaintiff not a resident in the county, without giving the security required by § 23 of the act. If, however, the objection is not taken at the trial, it is waived, and the court will be deemed to have jurisdiction.

In this case the return shows that the fact of the plaintiff's non-residence duly appeared, and, the objection having been taken by the defendants that the action was brought without

giving the security required by the act, the justice very properly dismissed the action. But, as it does not appear that any costs have been adjudged against the plaintiff, the determination of the justice appears to be incomplete, and, as was said by the late Supreme Court in a somewhat similar case, (*Monell* v. *Weller*, 2 John 8), is therefore incapable of reversal or affirmance.

For this reason the motion to dismiss the appeal must be granted.

DALY, First Judge, concurred.

BRADY, J., (*dissenting*).—Section 13 of the act relating to the district courts of this city, passed April 13, 1857, provides that, where the defendant is not a resident of the city, or where the plaintiff is not a resident, *and gives the security* required by the twenty-third section of that act, the summons must be returnable in not less than two nor more than four days from its date, and must be served at least two days before the time for appearance mentioned therein. And further, that in *all other cases* it must be returnable not more than twelve days from its date, and must be served at least six days before the time of appearance. Section 23, referred to, provides that plaintiffs not residing in the city and county of New York shall, before the *issuing of the short summons*, as provided in the 13th section, file with the clerk of the court a written undertaking, &c. Prior to the act of 1857, a short summons issued from a district court in favor of a non-resident plaintiff, upon his giving proof of the fact of non-residence, and tendering to the justice the security required by law; and the Act to Abolish Imprisonment for Debt, &c., (Laws 1831, p. 396, § 32), in respect to this proceeding, section 32 of the act of 1831, and section 13 of the act of 1857, are substantially the same. Under the former it has been held that the plaintiff might proceed by long or short summons, at his option, but if he chose the latter mode he must give security. It was a privilege, not a restriction. *Nichols* v. *Tracy*, 1 Sand. 278

King v. *Dowdell*, 2 Sand. 131; *Kelly* v. *Kelly*, 2 E. D. Smith, 250. Section 13 of the act of 1857 imposes no restriction, but grants a privilege upon compliance with a condition, namely, giving security, in which case the summons may be short. The language of the section is, "where the plaintiff is a resident, and gives the security required by the twenty-third section;" but where he does not give the security, it seems to me to be clear that he is then controlled by the second subdivision, which provides that in *all other cases* the summons must be returnable not more than twelve days, &c. There are no words of prohibition against proceeding by long summons. That is the general mode, while the proceeding by short summons is a specialty allowable when security is given. For these reasons, I think the justice erred in dismissing the complaint. It is said that section 45 of the act of 1857 renders it the duty of the justice to dismiss the action in all cases, if it appear that the plaintiff is a non-resident and has not filed the security contemplated by section 23. I submit, with great respect, that such a construction is not warranted by the language of the section referred to. It provides, that the justice shall dismiss the action when it is objected that the plaintiff is a non-resident of the county, and has brought the action without giving the *security required by the act.* I think I have shown that security is only required when the proceeding is by short summons. Indeed, the language of the twenty-third section so distinctly provides, as I understand it, in connection with section 13. It is as follows: "Plaintiffs not residing in the city and county of New York shall, before the *issuing of the short summons*, as provided in subdivision one of section 13 of this act, file with the clerk of the court a written undertaking, &c." There is nothing, therefore, in section 45 which affects adversely the conclusion at which I have arrived, because it appears that the justice has no power to dismiss the complaint, except in cases where a non-resident plaintiff proceeds *by short summons without giving security.*

The dismissal of the complaint was not upon failure of proof, or upon the ground that the facts alleged by the plaintiff were

not sufficient to constitute a cause of action. The case differs, therefore, from *Monnell* v. *Weller*, (2 Johns. Rep. 8). The justice dismissed the action upon the ground that he had no jurisdiction, and his decision is reviewable in this court for that reason.

I think the justice had jurisdiction, that he erred in dismissing the complaint, and that the judgment should be reversed.

Appeal dismissed without costs.

BENJAMIN CLAPP *v.* ROSWELL GRAVES.

HENRY B. CLAPP *v.* THE SAME.

Where the decision of this court, upon a question presented on an appeal from the judgment of an inferior court, is in direct conflict with a decision of the general term of the Supreme Court in this district, a proper case is shown for granting leave to appeal to the Court of Appeals.

MOTION for leave to appeal to the Court of Appeals. There were two actions commenced in the Marine Court, where the plaintiffs had judgment. The defendant appealed to this court, where the judgments were affirmed. The defendant now applied, under section 11 of the Code, for leave to appeal to the Court of Appeals. The question raised upon the appeal was, whether the Marine Court could acquire jurisdiction of an action against a non-resident defendant who was proceeded against by long summons? It appeared that at the trial, and after this objection had been taken and overruled, the defendant answered to the merits. In conformity with the previous decisions of this court on the same question, it was held that the defendant, by appearing and answering, waived any such defect or irregularity.

John Winslow, for the motion.

Harrington & Grieff, opposed.

PER CURIAM.—As the decisions of the general term of this court, in 1 E. D. Smith, 615, decided in December, 1852, and in *Lighter* v. *Haskins*, decided in November, 1849, are in direct conflict with a decision of the general term of the Supreme Court in *Robinson* v. *West*, (11 Barb. 309), decided in June, 1852, and overruling the decision of the general term of the Superior Court in same case, (1 Sandf. 19), we think that this is a proper case to go to the Court of Appeals.

Motion granted.

FRANCOIS ARRANGOIZ *v.* FRANCIS H. FRAZER.

In an action by the holder of a promissory note against a first indorser for value, before maturity, the answer alleged that the plaintiff was not the real party in interest, nor the owner of the note. That it belonged to one R., the second indorser, who, at the time he owned it, was indebted to the maker, and that the maker had notified the first indorser thereof, and forbidden him to pay it, and if he did pay it, the maker would not pay him.

Held, That the only material averment in the answer, was that which alleged the plaintiff to be not the real party in interest, nor the owner of the note. The residue constituted no defence, and was properly stricken out as irrelevant.

APPEAL by defendant from an order at special term, striking out part of an answer as irrelevant. The complaint was against the defendant as indorser of a promissory note. The answer averred that the note belonged to one Rafael Rafael, to whom it was passed by the defendant; and it alleged that the executors of the maker (the maker himself being dead) had a counter claim, or set-off, against Rafael, and had given the defendant notice that they had such claim, and that if he paid the note they should not pay him. The plaintiff moved to strike out the whole of this answer, except the allegation that Rafael was the owner of the note. The motion was granted at special term, and the following opinion was rendered:

BRADY, J.—The defendant is indorser of a note made by C.

G. Everett, and delivered to the defendant for a valuable consideration.

The defendant, for a like consideration, transferred it to one Rafael Rafael, and the latter transferred it to the plaintiff.

The defendant answers, substantially, that Rafael Rafael is the owner and holder of the note; that the maker has a claim against Rafael Rafael; that the maker has notified him (the defendant) of such claim; and also, not to pay the note in consequence thereof.

The note is good against the maker in the hands of the indorser, and good in the hands of Rafael against the *indorser* for the whole amount. The claim of the maker against Rafael, assuming him to be the real plaintiff, is not available to the defendant. It is not a counter-claim, or set-off, existing in his favor, and it is not an equity of which he is bound to take notice. I know of no principle on which, under such circumstances, the defence can be sustained.

The maker's remedy is against Rafael. The representatives of the maker might have accomplished the object in view by a transfer of the claim to the defendant. They have not made it, and the defence fails.

Motion to strike out granted, with costs.

From the order entered pursuant to this opinion the defendant appealed.

L. F. Therasson, for the appellant.

William H. Anthon, for the respondent.

By the court, HILTON, J.—The defendant appeals from an order at special term, striking out his answer as irrelevant, except the allegation to the effect that one Rafael is the real party in interest in this action, and that De Arrangoiz is only a nominal plaintiff. The cause of action alleged in the complaint is, that one Everitt made a promissory note for $1,000 to the order of, and delivered the same to, the defendant; that subsequently,

and before its maturity, the defendant indorsed it for a valuable consideration, and delivered it to the plaintiff, who is now the lawful owner and holder of it. That when it became due, the maker being dead, payment was demanded of his executor, and refused, and due notice thereof given to the defendant. The defence set up by the answer is, that the note was given to the defendant as part consideration for the transfer by the defendant of an interest which he owned in certain machinery, &c. That this interest was subsequently sold by the executor of the maker to Rafael, who afterwards sold it to the defendant, receiving this note in part payment of the purchase money. That at the time of this last sale, Rafael was, as defendant is informed and believes, indebted to the executor in upwards of $1,000 upon a contract made by Rafael with the executor, in connection with the sale by the executor to Rafael. That when the note became due, the executor gave notice of these facts to the defendant, and forbid his paying; adding, that if he did pay the note, the "executor would not refund the money to the defendant," and finally it is alleged, "on information and belief," that the plaintiff took the note with full knowledge of these facts; that he is only the nominal plaintiff, and Rafael is the real party in interest.

Taken as a whole, this is certainly a remarkable defence. Substantially, it may be stated thus:—The maker gave the note for a valuable consideration to the defendant; the defendant indorsed it for a valuable consideration to Rafael; Rafael transferred it before maturity, and for a valuable consideration, to the plaintiff; but, because at the time it was indorsed to Rafeal, he was indebted to the executor of the maker, the plaintiff ought not to recover. The defendant does not pretend to have any set-off, demand, or counter claim, against the plaintiff; does not even intimate that the note was transferred for the purpose of defrauding the executor of any set-off he may have against Rafael; and yet seems to think, when called upon to respond to the obligation he incurred by his indorsement, by a plaintiff admitted to be a *bona fide* holder of the note, who became such be-

fore maturity for a valuable consideration; that it is a sufficient defence to say, that, while the note was, before its maturity, in the hands of an intermediate party, the maker had a counter claim, which, if that party had held the note when it became due, and had sued the maker upon it, might have been set off against it.

It would be extraordinary, indeed, if such matter should not be deemed irrelevant; and the judge at special term was right in so considering it.

Order appealed from affirmed.

JAMES R. MOLONEY *v.* JAMES DO

THE SAME *v.* MYERS F. TRU

Where a verified complaint alleges matter, to the truth [redacted] if a witness, would be privileged from testifying, an [redacted]ga-tious, may be served without being verified.

If the right to serve an unverified answer be di[redacted]y be brought before the court for determination by a n[redacted]pon a failure to answer.

On such a motion, the defendant is not required to s[redacted]*ect* effect of admitting the truth of the matter charged would be [redacted]ject him to punishment or liability; it is sufficient that it might have th[redacted] tendency; nor is it essential to be shown how it would or might subject him to prosecution or punishment.

The inquiry is excluded when it appears that the object is to procure an admission of the party that he has been guilty of an act punishable as a crime, unless an indictment for it would be barred by the statute of limitations; when, if the matter is material, the party may be required to answer.

It *seems*, that if a witness or party has been pardoned for an offence, he is privileged from answering respecting it.

So *held*, where the defendant, without leave of the court, served an unverified answer, containing a general denial of a sworn complaint, charging the defendant with having committed a series of crimes; the action being to recover damages for the injuries to the plaintiff, which were alleged to be the direct result of the crimes specified.

APPEAL from an order made at special term, held by Judge

HILTON, denying a motion on the part of the plaintiff for judgment, as upon a failure to answer.

The action arose out of the proceedings of the so-called Vigilance Committee of San Francisco, in California. The peculiar nature of the suit, and the questions presented, seem to justify inserting the entire complaint, which was as follows:

"That from on or about the twenty-eighth day of February, 1849, to the present time, the plaintiff has been a good and reputable citizen of the state of California, and an actual inhabitant and resident of said state, from the said twenty-eighth day of February, 1849, to the fifth day of July, 1856, and has only been by violence excluded from the said state, as hereinafter appears. That on or about the 15th day of May, 1856, the defendant, James Dows, William T. Coleman and Eugene Dellessert, Isaac Bluxonie, J. P. Manson, Thomas J. L. Surdey, Charles Doane, James V. Olney, R. M. Jesup, N. A. Arrington, George R. Ward, J. D. Farwell, William Arrington, J. H. Fish, H. S. Brown, Thompson William Rogers, Charles L. Case, William H. Tillinghast, J. W. Brittain, Chauncey J. Dempster, U. P. Hutchins, L. Bossange, Emile Grisar, Jules David, Joseph P. Emery, Calvin Nutting, H. Tubbs, E. B Goddard, Aaron Burns, C. V. Gillespie, J. R. Osgood, —— Gorham, F. W. Page, Henry M. Hale, Edward P. Frank, Ernest Seyd, Myers F. Turett, —— Burke, —— Crary, John L Durkee and Charles E. Rand, as the plaintiff is informed and believes, and divers other persons to the plaintiff unknown, at San Francisco, in the state of California, wickedly and maliciously conspired and combined together to put to death unlawfully one James P. Casey, and to indemnify each other and their aiders and abettors for so doing; and to resist all courts and officers of law, who should seek to hold them accountable therefor; and to commit such other crimes and offences as such resistance to the law might involve, or the giving of a public color or motive to their acts might suggest or occasion. That the said conspirators thereupon assumed the name and style of "The Vigilance Committee of San Francisco," and suddenly, and in surprise of the authorities and peaceable

citizens, seized all the arms that could be found, and organized bands of armed men who obeyed their will and direction; and therewith, on or about the 18th day of May, 1856, broke open the prison belonging to the regular constituted authorities at San Francisco, overcoming the guards by threats and violence, and seized said James P. Casey, who was then confined as a prisoner there, awaiting trial; and also wantonly, or to give a less personal color to their acts, seized one Charles Cora, there likewise a prisoner, who had once been subjected to a lawful trial, and from failure of a verdict was awaiting another trial, and put the said Casey and Cora to death by hanging in the public street. That after such acts and doings, as last aforesaid, the said defendant and his confederates did not abandon or dissolve their said unlawful and violent organization and conspiracy, but, to deter the authorities from lawful action in the premises, and keep alarm and confusion as a cover for their unlawful conduct, and by false pretences of necessity and danger give color to the same, they, the said defendant and his confederates, seized and fortified as a fort a certain building on an insulated block of ground in the city of San Francisco, and set watches, sentries and guards, and kept organized, and under orders and control, bands of armed men and artillery forces, unlawfully, and with force, visited and searched houses and dwellings of citizens, and arrested and imprisoned their persons at their will, deterring or overcoming resistance with threats and violence, inflicting imprisonment, exile, and even death, upon those they saw fit, or who were obnoxious or dangerous to their said conspiracy, without legal trial, and sometimes without pretence of trial of any kind. That on or about the 2d day of June, 1856, and from thence continually, so long as the plaintiff remained in California, the said defendant and his said confederates were called upon, solicited and required by J. Neely Johnson, the governor of the state of California, to desist from and abandon their said violent and unlawful organization and conspiracy, and their interruption of and resistance to the legal authorities; but they, the said defendant and his said confederates, wantonly and

wickedly refused so to do. That thereupon on or about the 3d day of June, 1856, J. Neely Johnson, who then was, and has since continued, and now is governor of the state of California, issued his proclamation, calling upon and requesting all the citizens of the said state to enroll themselves in the militia of the state, and to aid the government, as bound by law, in subduing the said insurrectionary conspiracy, and restoring peace and order at San Francisco aforesaid. That thereupon, in pursuance of and in obedience to the said proclamation, the said plaintiff, on or about the 21 day of June, 1856, enlisted, and was enrolled in the said militia of the state, in Company A., under the command of Richard P. Ashe, acting as captain in such militia by duly constituted authority. That on or about the 19th day of June, 1856, the said J. Neely Johnson, governor of the said state, issued, and caused to be presented to General John E. Wool, commanding the United States' forces in California, his requisition for certain arms, the property of the state of California, then in the possession or under the control of the said general, and to be furnished by him, in accordance with such requisition and request, for the service of the said state of California. That such proceedings were had in furtherance of such requisition; that the said arms were duly furnished by the said General Wool, for the purposes of such requisition; and were, on or about the 19th day of June, 1856, duly placed in the charge of the said plaintiff, to be conveyed to San Francisco, for the service of the said state, pursuant to the direction and requisition of the said governor, as aforesaid; that during all the said last mentioned proceedings, the said plaintiff was active and efficient on behalf of the said governor, and the people and lawful authorities of the said state, in the endeavors, by lawful means, to subdue the said violent and insurrectionary conspiracy of the said defendant and his confederates, and was regarded by them with resentment and apprehension because of his zeal and efficiency in the premises; and hereupon the plaintiff shows that in view of the premises, and for the causes and motives in this count mentioned, and no other, and on or about

the 20th day of June, 1856, the said defendant and his confederates, so calling themselves the "Committee of Vigilance" as aforesaid, fearing the activity of the plaintiff in the premises, wickedly and maliciously conspired and combined together violently to seize the said arms of the state, so in the plaintiff's possession or charge as aforesaid, to assault, injure, and abuse the plaintiff, and finally, to crush and destroy him, and put him out of their way, unless he would make terms of submission to them. That in pursuance of such last mentioned wicked and malicious conspiracy, on or about the 21st day of June, 1856, in the night time, while he, the said plaintiff, with the said arms in his possession or charge, then and there, on board a certain schooner called the Julia, then being in or near San Pablo Bay, on the high seas, between Benicia and San Francisco, he, the said defendant and his confederates, caused the said vessel to be broken in upon, and the said arms seized and carried away, and the person of the plaintiff to be assaulted and seized with force and violence by certain armed men, to wit:—John L. Durkee and Charles E. Rand, and others to the plaintiff unknown, and caused the said plaintiff to be made and kept a prisoner by such armed men, and exposed to apprehension and fear of his life, and carried and conveyed as such prisoner to San Francisco, and there publicly exposed and exhibited as a prisoner, being imprisoned and kept as a prisoner for about five hours, and then discharged him, pretending no complaint against him or ground of detention. That afterwards, on the same 21st day of June, 1856, in pursuance of their said unlawful, corrupt, and malicious conspiracy against the plaintiff, they, the said defendant and his co-conspirators, gave order for the immediate arrest and imprisonment of the said plaintiff, and then and there caused the plaintiff to be assaulted by one Sterling A. Hopkins, an armed agent and instrument of the said defendant and his said confederates, accompanied or aided by other agents of the said conspiracy acting in his aid, in order again to deprive the plaintiff of his liberty, and remove and imprison him. And the plaintiff, to escape such violence and imprisonment, having fled to a certain

armory of the state of California, at San Francisco aforesaid, he, the said defendant and his said confederates and co-conspirators, caused armed men to assemble around the said armory, with cannon pointed against the doors thereof, and by demonstrations of force, and threats of extreme violence, to again obtain possession of the plaintiff's person, and deprive him of his liberty; thereupon, by such armed men, acting under the orders of the said defendant and his co-conspirators, the said plaintiff was again assaulted and seized, and imprisoned in a dungeon held and used by the said conspirators, and kept a close prisoner from the 21st day of June, 1856, to the 5th day of July, 1856; they, the said defendant and his co-conspirators, concealing the plaintiff's person in the meantime from the United States' marshal, who had been and was seeking to execute a writ of *habeas corpus* for the body of the plaintiff, by removing his person from one place of confinement to another, while said marshal was seeking the plaintiff to serve such writ, and evading and misleading the said marshal so as to evade and defeat such process; and finally, on or about the 4th day of July, 1856, the defendant and his co-conspirators, in pursuance of their said wicked and malicious conspiracy against the said plaintiff, and with the intent finally to remove and subdue, and effectually destroy him, wickedly and maliciously agreed together to have the said plaintiff abducted, carried off, and forever exiled from the said state of California, and that he should be put to immediate death in case he should ever return to the said state; and all explanation or satisfaction to the plaintiff, as to the grounds or pretext for such cruel and arbitrary treatment, and all facilities to the plaintiff for examining his books and accounts, arranging his business, and communicating with his friends and agents, so as to save and prevent what loss and damage he could of that which must necessarily and did accrue from his sudden removal and abduction from California, was then and there arbitrarily, wantonly, wickedly and maliciously refused to the plaintiff; and thereupon afterwards, to wit, on the next day, being the 5th day of July, 1856, in pursuance of the said unlawful, wicked and malicious conspira-

cy, the said defendant and his said co-conspirators caused the said plaintiff to be assaulted, seized and taken by armed men, the agents of the said conspiracy, and members thereof, and carried to a certain wharf at San Francisco aforesaid, and to and on board of a certain steamer, called the John L. Stephens, then there lying and being, and on such steamer to be abducted, kidnapped, exiled and banished from the said state of California; that the said steamer, with the said plaintiff, thus by force and violence, and against his will, in and on board thereof, did leave San Francisco for Panama, in the state of New Grenada, very shortly after the plaintiff was thus violently and forcibly put on board thereof, on the said 5th day of July, 1856; the last action of the said defendant and his said co-conspirators as to the said plaintiff, before the leaving of the said steamer, being that a certain member of the said conspirators, affecting and burlesquing all the forms and ceremonies of the most august and regular tribunal, summoned the plaintiff on board the said steamer, and reannounced to him, producing certain papers as the acts or process of such mock-tribunal, that he, the plaintiff, was banished from California, never to return under the severest penalties, (*i.e.*,) "death;" that the said defendant and his co-conspirators had bodies of armed men, in great numbers, arrayed on the wharf where said steamer lay, to carry out their arbitrary sentence and orders, and defeat all rescue by citizens or duly constituted officers of the courts of California; and by means of the said conspiracy, and by the violence and force aforesaid, the said plaintiff was then and there abducted and exiled from the state of California, and has since continued exiled and excluded therefrom, being notified and solemnly warned that the said wicked conspirators have agreed and resolved, and mutually bound and pledged themselves to each other to put the plaintiff to death at once, in case of his return to California; all which last mentioned outrages and monstrous acts of the said defendant and his co-conspirators were wantonly wicked, corrupt and malicious, to the great grief and affliction, damage and injury of the plaintiff, and the destruction of his individual rights, and to the great

scandal and disgrace of all civil government and authority at San Francisco aforesaid, and whereby, and by means of which last mentioned wrongs, grievances and outrages, the plaintiff has been not only greatly injured in person and health, and humiliated, afflicted and distressed in mind and feelings, but has been degraded and blasted in character and position, and broken up and crushed in his business, property, interest, credit, circumstances, plans, prospects and arrangements; deprived of his home and accustomed means of support, livelihood and occupation, and the future of his life destroyed.

And the plaintiff further shows and alleges to the Court, in connection with the claim for damages hereinafter set forth, for and by reason of the wrongs, oppression and grievances hereinbefore stated, that the said conspiracy, calling itself "The Vigilance Committee," pretending its proceedings to be necessary for the public good, and to be for that object, was, in fact, unjust, unnecessary and mischievious, the result of personal passion, rage, malice, arrogance, tyranny in its origin, and was afterwards most wantonly, mischievously and dangerously continued in its operations; partly from the same motives with which it commenced; partly from the fear of the parties that if they abandoned their armed, organized and alarming position, they would be promptly held to legal accountability; and partly to give a color of public motives to their conduct; that, nevertheless, the said defendant and his co-conspirators have, from the beginning of the said proceedings, wantonly and maliciously seeking thereby to cover and color their own monstrous and oppressive conduct, given out, and caused to be proclaimed to the public, in numerous organs of publicity controlled by them, (without being able, or daring to specify any particular alleged offence), that the plaintiff was a notorious criminal and offender, and a worthless, disreputable character, they well knowing the contrary. That Sterling A. Hopkins, hereinbefore mentioned, was employed to assault, arrest and imprison the plaintiff, by the defendant and his co-conspirators; was an executioner or hangman of the said conspirators; that the plaintiff, while held

a prisoner by the defendant and his co-conspirators, was confined in a cell, and subjected to jeers, contumely and insult; was twice hand-cuffed and put in irons, and led to-and-fro by armed men, exciting his apprehensions that he was being led to death, his inquiries as to what was to be done with him being unheeded and unanswered, was under just apprehension of being poisoned in his food, or put to death in some other secret way; was arbitrarily deprived of the reading of public journals of his own choice and selection; was removed from one place of imprisonment to another. That while the said plaintiff was so unlawfully in prison, he was subjected to insulting visits and interrogatories on the part of the said conspirators, with armed guards constantly standing at the door of his cell night and day; and, after operations to excite or increase the plaintiff's apprehension of further violence, such insulting and alarming visits, interrogatories, and inquisition to the plaintiff, in his cell, were renewed: they, the said conspirators, seeking by the operation of imprisonment, threats, and fear, to obtain from the plaintiff disclosures and information, aid and facilities for the prosecution of violent designs.

That the plaintiff, during his residence of many years in California, and up to the time of his abduction, was, and had been largely engaged in business, trade, and operations; and had property and pecuniary interests, exclusive of debts owing to him, unsettled, and unclosed or disposed of, to a large amount, which business, property, interests and operations, by his said sudden imprisonment and banishment, have been greatly, if not totally and irretrievably damaged and lost; that he had, when he left California, a large amount of debts due him, which have been, as he believes, wholly lost by reason of the actions of the said defendant and his co-conspirators, to the extent of from seven to ten thousand dollars, as he believes; that he had, as naval store-keeper at San Francisco, (an office held by him for about a year), an unsettled account with the United States government, which, by the wilful conduct of the defendant and his confederates, he was prevented from settling, to his great loss

and damage. That the said defendant and his co-conspirators, during all his said imprisonment, refused to communicate to him any explanation of their outrageous conduct, or any charge, accusation, or complaint, or to give him any trial or examination; that they also wantonly and maliciously refused to the plaintiff all reasonable facilities to enable him to lighten or guard against losses in his business by examination of his books and accounts, and communication with friends or agents; and that finally, on occasion of the actual abduction and exile of the plaintiff, against which the plaintiff always indignantly complained and remonstrated, and so far as he could, without inviting further violence, resisted, they, the said defendant and his co-conspirators, well knowing and mocking his feelings, required and insisted that he, the plaintiff, should sign a paper requesting substantially, or, as they meant and intended to construe it, his own abduction, under threats of deporting him to some distant island in the Pacific, where he could with great difficulty and delay, if ever, return, in case of his refusal; that the plaintiff long resisted compliance with such wanton, insulting, tyrannical requisition, but, from force and duress, and apprehension of further violence, finally signed such paper, being advised, and believing such proceeding, under the circumstances, to be empty, void and nugatory, for any purpose beneficial to the said conspirators, or prejudicial to the plaintiff. For all which wrongs and grievances hereinbefore set forth, the said plaintiff prays judgment for damages against the said defendant, for and by reason of the premises, for the sum of one hundred thousand dollars, besides costs."

The usual verification was attached.

The defendant served an unverified answer, denying generally "each and every allegation in the complaint," which was immediately returned, with a statement that it would not be accepted because no verification was attached. The plaintiff then moved, upon notice, for judgment as on a failure to answer. The motion was denied, and the plaintiff appealed. The proceedings were alike in each case.

George Bowman, for the appellant.

Jeremiah Larocque, for the respondent.

By the court, DALY, First Judge.—The verification of an answer may be omitted where the defendant, if a witness, would be privileged from testifying as to the truth of any matter alleged in the complaint (Laws of 1854, p. 153) and denied by the answer. The complaints in these cases charge the defendants with having committed a series of crimes, and there can be no doubt that, if they were under examination as witnesses, they would be privileged from answering as to many of the matters alleged in the complaints.

It is insisted, however, that a defendant cannot put in an unverified answer to a sworn complaint until he has satisfied the court that it might expose him to a prosecution for a crime to verify it, or subject him to a penalty. That he must first move the court upon an affidavit declaring that such would or might be the effect if he were compelled to verify. That he must, by bringing the matter before the court in the form of an affidavit, place himself in a position somewhat analogous to that of a witness under examination, that it may be left to the court to decide whether he must verify his answer or not—as it is not for him to determine whether he would be privileged, as a witness, from testifying to the truth of the matter denied by his answer.

The 154th section of the Code, and the act of 1854, are both founded upon a familiar principle in the law, that no one can be compelled to accuse himself of crime, or to disclose anything that may have a tendency to expose him to a prosecution upon a criminal charge, or to any kind of punishment, or even to a penal liability. 1 Greenleaf's Evid., § 451. It is not necessary that such should be the direct effect; it is enough if it would or might lead to criminal proceedings against him. *Bellinger* v. *The People*, 8 Wend. 595. If it would furnish one link in a chain of circumstances that would convict him, he need not answer. 1 Burr's Trial, 244; *Paxton* v. *Douglass*, 16 Ves. 242.

Or, if he declares that he cannot answer without subjecting himself to criminal liability, he cannot be required to show how or in what way it would have that effect. *People* v. *Mather*, 4 Wend. 229; *Paxton* v. *Douglass*, *supra*.

This privilege is not confined to a witness on the stand, but extends to a party in every stage of a case. Thus, in a court of equity it is well settled that no man need discover matters tending to criminate himself, or to expose him to a penalty or forfeiture; so that if a bill charges anything which, if confessed by the answer, may or might have a tendency to subject the defendant to a criminal prosecution, or to a penalty, he may claim his protection by demurring to so much of the bill. *East India Company* v. *Campbell*, 1 Ves., sr., 246; *Chetwynd* v. *Lindon*, 2 id. 450; *Brownsword* v. *Edward*, id. 243; *Parkhurst* v. *Lowten*, 2 Swanst. 214; *Cartwright* v. *Green*, 8 Ves., jr., 405; *Skinner* v. *Judson*, 8 Conn. 521; *March* v. *Davidson*, 9 Paige, 580; Adams' Doctrine of Equity, 2; 2 Daniel's Chancery Practice, 46. Or, if the objectionable disclosure is not apparent upon the face of the bill, he may raise the objection by plea, as in *Claridge* v. *Hoare*, (14 Ves. 59), where it is said, "If a bill states a marriage with a particular woman, the defendant may plead that she is his sister, and refuse to state anything more, or to speak as to any one fact forming a link in the chain." So, where a witness in equity is examined upon interrogations, he may refuse to answer any question tending to criminate him, or to subject him to a penalty, and his objection comes up in the form of a demurrer alleging the reason or grounds of the witness' objection, which, if denied, must be supported by an affidavit. Gresley's Equity Evidence, 77; *Parkhurst* v. *Lowten*, 3 Madd. 121. In every case, therefore, at law or in equity, in which a witness or a party claimed the protection afforded by this general rule, the question of his privilege was one for the determination of the court, and was brought before it either by an objection raised on the witness' behalf at the trial, or by the defendant's demurring to the discovery sought by the bill, or where it could not be raised by a demurrer to the bill, by bringing it before the court in the

form of a plea; or where a witness was examined out of court, by an instrument in writing, transmitted to the court by the officer before whom the witness was under examination, stating the grounds of his objection, accompanied by the proofs, if the reasons or grounds given by the witness were denied. Gresley's Equity Evidence, by Calvert, 77, note *f*. The question whether the party or the witness was privileged, came up in some shape to enable the court to determine judicially upon its validity. It was never left to the election or determination of the party, or of the witness.

Has this course of procedure been abrogated by the act of 1854, and the previous enactments in the Code? The act is very brief. It simply declares that "the verification of any pleading, in any court of record in this state, may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading."

A provision substantially similar to this was incorporated in the Code when first enacted in 1848, (§ 133), that "the verification may be omitted when the party would be privileged from testifying as a witness to the same matter." It was stricken out at the amendment of the Code in the following year, and in the amendment of 1851 the provision in the Code, as it exists at present, was inserted—"that the verification may be omitted when an admission of the truth of the allegations might subject the party to a prosecution for felony," which was modified afterwards by the special statute of 1854, above referred to, bringing things back very much to what they were seven years before, when the Code was first enacted. During this course of varying and inconstant legislation, this ever-changing and shifting provision underwent judicial construction in a number of cases: *Hill* v. *Muller*, 2 Sandf. 684; *White* v. *Cummings*, 3 id. 716; *Clapper* v. *Fitzpatrick*, 3 How. 314; *Thomas* v. *Hanop*, 7 id. 57; *Springstead* v. *Robinson*, 8 id. 141; *Scoville* v. *New*, 12 id. 319; *Lynch* v. *Todd*, 13 How. 548; *Blaisdell* v. *Raymond*, 5 Abbott, 144.

It would be unprofitable to review these cases, as the act of

1854 must be regarded as controlling all the previous legislation, and it alone must be looked to in determining what is now the proper practice. It makes provision only for the service of an unverified answer where the defendant, by his answer, denies some matter in the complaint, in respect to the truth of which he could not be interrogated if he was under examination as a witness. The matter, averment, or fact in the complaint, denied by the answer, will be indicated by the complaint and answer, and if it is not of a character to justify the service of an unverified answer, the plaintiff has an easy remedy. He may move the court, as has been done in this case, for judgment for want of a sufficient answer, which, I suppose, would be his proper course; or, if he should enter judgment for want of an answer, the question could come before the court upon the defendant's motion to set the judgment aside. The question could not, as was the former practice in equity, be brought before the court by a demurrer, for the Code has defined the cases in which a defendant may demur, and this is not one of them. The only course for a defendant, therefore, under this act, where something is alleged in the complaint which he could not be interrogated upon if he was a witness, and which it is material he should put in issue, is to deny it by his answer, and serve his answer without verifying it. If it is not of the character supposed, the plaintiff's motion for judgment will bring the question as effectually before the court as it was brought under the old equity practice, by a demurrer to so much of the bill. If the question of privilege is of such a nature that it would not appear by a mere denial of the averments in the complaint, then the act of 1854 has made no provision for such a case, and the old equity practice would prevail. The defendant would have to put in a verified answer, setting forth, analogous to the former plea in equity, the grounds or reasons why he is excused from answering any of the averments in the complaint, and if there is no validity in the reason or grounds assigned by him, the plaintiff, as before, may move for judgment for want of a sufficient answer. In either case, upon the service of an unverified answer,

or an answer verified, but assigning grounds why certain averments in the complaint should not be answered, the plaintiff, by a motion for judgment, can take the sense of the court as to the defendant's right not to answer certain averments, or to serve an unverified answer. He can raise the question as effectually in this way as he could by the course of proceeding that was in use under the former equity practice.

In these cases the defendants denied the averments in the complaints, and served their answers without verifying them. They adopted, in my judgment, the proper course, and on this motion for judgment it is sufficient to say, that there were averments in the complaints of a character that entitled the defendants to serve their answers without verifying them. The whole scope and tendency of the acts attributed to them is to show that they were guilty of crimes and misdemeanors. To use the language of the court in *Skinner* v. *Judson*, 8 Conn. Rep. 529, "a defendant is protected from making answer when the allegations of a bill state many facts, each and all of which have a joint or united tendency to bring him within the penalty of the law."

It is suggested that the defendants may have been pardoned, or tried and acquitted, or absolved from liability by lapse of time, or by a legislative act of amnesty, and that unless some proof is submitted, the court cannot assume that they are liable to punishment even if they have committed the acts attributed to them in the complaint. This suggestion might have been made with equal force against the former equity practice of allowing a defendant to demur to so much of a bill as imputed to him, or charged him with having committed a crime, and yet that practice was well settled. It is not necessary, as before remarked, that the direct effect will, or would, be to subject the party to punishment or to liability. It is sufficient that it may, or might, have that tendency, and neither a defendant nor a witness can be required to show how it would, or might, subject him to prosecution or punishment. The inquiry is totally barred the moment that it is apparent to the court that the object of it

is to obtain from the defendant or the witness an admission that he has been guilty of an act punishable as a crime; unless the interrogators refer to an act, an indictment for which would be barred by the statute of limitations, (*Roberts* v. *Abbott*, 1 Moody & Malkin, 192; *People* v. *Mather*, 4 Wend. 255,) when, if the inquiry were material, the party interrogated would be bound to answer. Even where a witness has been pardoned for the offence, he is privileged from answering respecting it. *Rex* v. *Reading*, 7 Howell's State Trials, 296; *Rex* v. *Earl of Shrewsbury*, 8 id.

Order appealed from affirmed.

Reuben F. Harriott *v.* The New Jersey Railroad and Transportation Company.

A non-resident plaintiff cannot maintain an action in this court against a foreign corporation unless it appears that the action is upon a contract made, executed or delivered in this state, or that the cause of action arose, or the subject of the action is situate, within this state.

This court has, therefore, no jurisdiction of a suit brought by a non-resident plaintiff against a foreign corporation to recover damages for a wrong committed out of this state.

Appearing and answering only waives the question of jurisdiction so far as it relates to the person; but if the subject matter of the action is not within the jurisdiction of the court, no assent or waiver of the parties can make a judgment upon it effectual.

Appeal from a judgment at the special term, dismissing the complaint. The action was brought to recover damages, laid in the complaint at $800, for killing a horse belonging to plaintiff, through the negligence of defendant's servants. The pleadings did not show where the plaintiff resided. They showed, however, that the defendants were a corporation created by the

laws of New Jersey, but having an office, and owning property within this state. The alleged killing of the plaintiff's horse took place in New Jersey.

On the first trial of the cause it appeared in evidence that the plaintiff was a non-resident of this state. That trial resulted in a disagreement of the jury. On the second trial, after the counsel for plaintiff had opened the case to the jury, the plaintiff's non-residence being conceded by his counsel, a motion was made on the part of defendants to dismiss the action for want of jurisdiction. The complaint was thereupon dismissed by the direction of the court, and the plaintiff appealed.

Edmund Yenni and *James W. Gerard*, for the appellant, argued that the defendants voluntarily submitted to the jurisdiction of the court, by appearing and putting in an answer, setting up no defence of want of jurisdiction, nor taking advantage of it by motion. The provisions of the Code were intended as a personal privilege to the defendants not to be called upon to litigate—for acts done in New Jersey, where they were incorporated—in the Fora of this state; but if they waive this right, and submit to our courts, they cannot be allowed, when the trial is called on, to withdraw that submission.

The whole case turns upon this point: Has this court jurisdiction over the subject matter? If it has, then a want of jurisdiction over the person is always waived by a general appearance and plea to the action. There can be no doubt that this court has jurisdiction over the subject matter. Suppose the railroad in New Jersey had been owned by an individual, and that individual living in the city of New York, or, what is stronger, living in New Jersey, and on being served with process appears and pleads to the action, would there be any doubt that this court could try such a cause and pass judgment and execution? Make the case stronger still: suppose the road owned by a citizen of New Jersey, and only transiently here, and served with process, could he plead (this being a court of general juris-

diction,) that this court had no jurisdiction over an action of trespass to personal property, committed in New Jersey? The Code or statutes which organize the Common Pleas, do not deprive the court of jurisdiction, because the defendant is a non-resident of this state, if he is found within it so as to be served with process.

Want of jurisdiction over the subject matter cannot be waived by consent, but want of jurisdiction over the person is waived by a general voluntary appearance. *Martyn* v. *Fabriques*, 2 Smith's L. Cases (Hare & Wallace's ed.,) 765 and notes. A corporation can be sued just like an individual, except where the statute denies jurisdiction over them. *Marshall* v. *Baltimore and Ohio RR. Co.*, 16 How. (U. S.) R. 327.

This action is for injury by collision, destroying cattle; and the defendants appear and answer to the merits, and take no exception to jurisdiction in their answer.

A voluntary appearance of a corporation gives jurisdiction against a foreign corporation, the same as against an individual. 4 How. Pr. R. 275, 415; 5 How. Pr. R. 183.

In the case of the *Bank of Commerce of Boston* v. *The Washington RR. Co. of Vermont* (10 How. Pr. R. 8,) Judge HAND takes up all the sections of the Code in reference to sueing foreign corporations, and shows that when they are properly in court, a general judgment *in personam* is got against them, the same as against any individual—and he intimates that section 134, sub. 1—135 of the Code (amendments 1851)—enlarges section 427, sub. 1, of the Code, and allows a general action to be brought in this state against a foreign corporation, where it has property in this state; thus giving jurisdiction over foreign corporations, if any one of these three things exist: 1st. If the plaintiff is a resident of this state. 2d. If (the plaintiff residing anywhere) the cause of action accrued in this state. 3d. If the corporation has property in this state (no matter where the plaintiff resides.) Our complaint is based on that amendment precisely; for it does not base its jurisdiction either upon the plaintiff being a resident, or upon the cause of action having accrued

here, but that the defendants had an office of business and property within the city, county and state of New York. This decision of Judge HAND was affirmed at general term.

In *Bates* v. *The New Orleans RR. Co.* (13 How. Pr. R. 519,) it is intimated and conceded that a voluntary appearance gives jurisdiction in a case where the court has not jurisdiction; and by section 139 of the Code, a voluntary appearance is equivalent to a personal service of the summons; and the note to that section contains a number of cases, to show that a voluntary and general appearance, besides being equivalent to a personal service of the summons, is a waiver of all defects in the summons or previous proceedings.

Dix v. *Palmer*, 5 How. Pr. R. 233. By appearing, the defendants admit themselves to be regularly in court; and, upon the question that appearance waives objections to the jurisdiction, see *Sperry* v. *The Mayor, &c.*, (1 E. D. Smith's R. 351); *Monteith* v. *Cast*, (1 E. D. Smith's R. 412); *Andrews* v. *Sharp*, (1 E. D. Smith's R. 615; and 2 E. D. Smith's R. 22.) Though consent will not give jurisdiction over the subject matter, it will over the person. Now the Common Pleas has jurisdiction over the subject matter. It can try injuries done by railroads—and done in a foreign state, if the owners of the railroad are individuals. It is, therefore, only a question of jurisdiction over the person of the defendants. *Spaulding* v. *The Hudson Manufacturing Co.* (2 E. D. Smith's R. 38,) is a case in point—of a suit in a justice's court against a foreign corporation in New Jersey. *Snyder* v. *Goodrich*, 2 E. D. Smith's R. 84: The parties, plaintiff and defendant, were both non-resident. They appeared and plead to the merits, and no objection was taken. It was held, that the court had no jurisdiction, because the statute expressly declares that a judgment in such a case shall be utterly void. These two cases look against us, but they are not. They were so decided because the statute expressly declares the judgments void. *Smith* v. *Dipeer*, 2 Code R. 70: Judge DALY decides, "consent gives jurisdiction over the person." *Hulbert* v. *The Hope Mutual Ins. Co.*, 2 Code R. 148: A voluntary ap-

pearance gives the court jurisdiction over a foreign corporation—so as to have a judgment *in personam*. Otherwise, it is only a proceeding *in rem* against property in this state attached; and *Brewster* v. *Michigan RR. Co.* (3 Code R. 215,) lays down the same principle. In 1 Sandford's S. C. R. 19, it was decided that consent gives jurisdiction, unless the court is prohibited from taking jurisdiction over the subject matter; and in *Smith* v. *Elder* (3 Johns. R. 105,) it was held that an appearance gives jurisdiction over a suit which could only be otherwise tried in a foreign country; and, to conclude, *Seymour* v. *Judd* (2 Comst. 467), shows that consent waives most important wants of jurisdiction.

Edgar S. Van Winkle, for the respondent, argued:

I. The jurisdiction of a court is composed of two branches—1. Jurisdiction of the person or party. 2. Jurisdiction of the subject matter. The first is barred by the privilege or exemption of the party; the second, by the authority or constitution of the court itself. The first, being a privilege, may be waived by the party in whose favor it exists; the second, being a restriction on the power of the court itself, can never be extended: Hence the two maxims of law—1. A person can waive a personal privilege, and 2. Consent cannot confer jurisdiction. Thus, for example, 1. The process of a court cannot run into a foreign country; yet, if a party receiving it there choose to appear, the court will have jurisdiction of his cause. 2. The state courts have no jurisdiction of suits for infringements of patents, so that if a defendant appear in such a suit in a state court, and plead to the merits, he may afterwards, on writ of error, raise the question of jurisdiction; and even a judgment obtained in such suit can be impeached and held null at any time. Again: Foreign consuls can only be sued in the federal courts, yet if they appear in state courts, and do not claim their exemption, the court has jurisdiction of the cause. Or, justices of the peace cannot try any suit in which the title to land comes in question, and a judgment given in such case will be void,

although the parties permitted judgment without raising the question.

II. In the present case, the court confessedly would have had no jurisdiction of the *subject matter* if the objection had been taken by answer, or plea to the jurisdiction. It is a suit against a foreign corporation by a non-resident, and is not founded on contract, and this court has no jurisdiction in such a case. Code of Procedure, § 33, sub. 3, § 427. The policy of the law has excluded such claims from our tribunals.

III. Nor can any consent or silence help the jurisdiction of the court, for the restriction is on the authority of the court itself, and the objection is one which can be taken at any time. *Ex parte Bouman*, 4 Cranch, 75; *Doe ex dem. State of New Jersey* v. *Babcock*, 4 Wash. C. C. R. 344; *Ketchum* v. *Sullivan et al.*, 4 Wash. C. C. R. 4; *Wood* v. *Mann*, 1 Summer C. C. R. 587. If an inferior court have not jurisdiction over the *subject matter*, it will be a ground of non-suit at the trial. 1 T. R. 151. And if there be a total want of jurisdiction, in any of the courts of England the matter may be pleaded in bar, or given in evidence under the general issue, even in an action in the superior courts at Westminster. 1 Chitty Pl. 379 n. b., 381; 6 East, 583; 1 East, 352; Bac. Abr., Title Pleas, E. 1; 4 T. R. 503. Consent cannot confer jurisdiction, although it may cure an irregularity in process, or render valid an irregular process. *Coffin* v. *Tracy*, 3 Caine's R. 129; *David* v. *Packard*, 6 Peters, 276; *Overstreet* v. *Brown*, 4 McCord's R. 79; *Dudley* v. *Mayhew*, 3 Comst. R. 9; *Burckle* v. *Eckhart*, 3 Comst. R. 132; *Carroll et al* v. *Dorsey et al.*, 20 How. (U. S.) Rep. 204; *United States* v. *Yale et al.*, 6 id. 605; *United States* v. *Curry*, 6 id. 106; *Buckingham et al.* v. *McLean et al.*, 13 id. 150; 3 Cow. & Hill's Phil. on Evid. 1024, 1025, and cases cited; *Striker* v. *Mott*, 6 Wend. 465; *Preston* v. *Boston*, 12 Pick. 7; *The State* v. *Turner*, 1 Wright's (O.) R. 20, 33.

IV. The following are all cases of questions of regularity, when defendant's voluntary appearance was held to preclude him from questioning the jurisdiction. *Smith* v. *Dipeer*, 2 C. R.

70, was a case of irregular service of process. *Pixby* v. *Winchell*, 7 Cow. 366, was an irregularity in the *teste* of the *capias*. *Wright* v. *Jeffrey*, 5 Cow. 15. The *capias* was returnable on Sunday, and without knowing the fact the defendant had put in special bail, and was held to be concluded. See, also, *Smith* v. *Elder*, 3 Johns. 105; *Cook* v. *Champlain Trans. Co.*, 1 Denio, 91; Cowen's Treatise (4 ed.) 38, 39.

By the Court, BRADY, J.—The Code, by section 33, subdivision 3, defines the jurisdiction of the Court of Common Pleas over actions against foreign corporations, and confers it only where the action is for a debt or damages, whether liquidated or not, arising upon contract made, executed, or delivered in this state, or where the cause of action arises therein. Section 427 provides that an action may be commenced in the Supreme Court, the Superior Court of the city of New York, and in the Court of Common Pleas for the city and county of New York, by a resident of this state, for any cause of action, and by a plaintiff not a resident, when the cause of action shall arise, or the subject of the action shall be situate, within this state. To enable a non-resident plaintiff to maintain an action, therefore, in this court against a foreign corporation, one of three requisites at least must appear: 1. That the action is upon a contract made, executed, or delivered in this state; or, 2. That the cause of action shall have arisen in this state; or, 3. That the subject of the action shall be situate within this state. Here none of these requisites exist. The plaintiff is a non-resident, and the cause of action arose in the state of New Jersey. He has, therefore, no *status* in this court, and his action cannot be entertained.

It was urged on the argument that the defendant having appeared and answered without raising any objection to the jurisdiction of the court, and the court having jurisdiction of cases brought to recover damages for injuries done by railroad companies, the question was one which related to the person and not to the subject matter. The answer to this proposition is, that the statute has declared in effect that the court shall not have juris-

dictions of such actions against a foreign corporation, unless the plaintiff resides in this state or the cause of action arose therein. It has jurisdiction of all actions between individuals for injuries inflicted, without regard to the residence, when the defendant is personally served with process within the city of New York, but against foreign corporations only in the cases specified. The objection, therefore, urged by the defendants does not present a question of jurisdiction over the person. We have decided that a defendant, by appearing and pleading to the merits, waives all objections of jurisdiction to the person, but not to the subject matter. *Hogan* v. *Baker*, 2 E. D. Smith, 22; *Paulding* v. *Hudson Manufacturing Co.*, ibid. 38. And the Court of Appeals have decided that no assent by the parties can confer jurisdiction or render the judgment of a tribunal effectual, in a matter over which it has not by law jurisdiction. *Dudley* v. *Mahew*, 3 Comst. 12; *Burckle* v. *Eckhart*, ibid. 132; see, also, *Coffin* v. *Tracy*, 3 Caine's Rep. 129; *Davis* v. *Packard*, 7 Peters, 276; *U. S.* v. *Yale et al.*, 6 How. (U. S.) R. 605; *U. S.* v. *Curry*, ibid. 106.

In *Dudley* v. *Mayhew* (*supra*,) the objection to the jurisdiction was first interposed by plea, but subsequently withdrawn and a stipulation given not to raise it further; but as consent could not give jurisdiction, the decree of the chancellor was reversed.

Judgment affirmed.

Rufus E. Crane *v.* Joel Holcomb.

In all actions for the recovery of money, unless the plaintiff recovers $50 or more, the defendant is entitled to costs, of course.

In an action upon a promissory note for $750, a set-off, or counter claim, exceeding that amount, was interposed as a defence. The plaintiff recovered but $26. ***Held,***

I. That his right to costs was not determined by his being the prevailing party in the suit, but was dependent upon the actual amount recovered.

II. His recovery being under $50, the defendant was entitled to costs.

III. That a judgment entered in favor of the defendant for his costs, after deducting the sum found due the plaintiff, was regular.

The case of *Kalb* v. *Lignot*, (3 Abbott P. R. 190), *contra*, disapproved.

APPEAL from an order made at special term, denying a motion on the part of the plaintiff to vacate a judgment entered in favor of the defendant for his costs, as adjusted, after deducting therefrom the amount reported by the referee as due the plaintiff in the action.

The facts sufficiently appear in the following opinion of the judge who heard the motion at special term, May 8, 1858.

HILTON, J.—The plaintiff sued as indorser and holder of a promissory note made by the defendant. The answer set up a counter claim against the payee while he was the holder of the note, and alleged that it came to the plaintiff's possession after maturity, and subject thereto. On the trial before the referee, the greater part of the counter claim was allowed, and the plaintiff recovered but $26.34. The report awarding this sum having been taken up by the defendant and filed, the clerk adjusted the defendant's costs at $121.15, and after deducting the sum found due the plaintiff, judgment was entered against him for the balance of $94.27 in favor of the defendant. The plaintiff moves to vacate and set aside this judgment upon the ground that he was the prevailing party at the trial, and, therefore, no costs or judgment in the action can be recovered or entered against him.

In support of this view he refers to the decision in *Kalb* v. *Lignot*, 3 Abbott P. R. 190, which certainly goes to the extent of declaring, in a case similar to this, that as the defendant was not the prevailing party within the meaning of section 303 of the Code, he, therefore, could not recover costs.

Although the opinions of the learned judges in the case cited are entitled to great respect and consideration, yet, after a careful perusal of sections 303, 304, 305 of the Code, I cannot agree with them in the views expressed in the decision referred

to. Section 303, after repealing all statutes establishing or regulating costs or fees of attorneys and counsel in civil actions, declares that there *may* be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action. In no proper sense can language of this kind be said to control the positive and mandatory character of the two following sections. By § 304, "Costs *shall* be allowed, of course, to the plaintiff, upon a recovery in the following cases."

* * * * * * *

Sub. 4. "In an action for the recovery of money where the plaintiff shall recover fifty dollars, or more."

The plaintiff's right to costs, "of course," is not dependent merely upon his being the prevailing party, but rests entirely upon the fact whether, in an action falling within the subdivision referred to, he recovers "fifty dollars or more." In this case, the recovery being under $50, it is very clear that the plaintiff is not entitled to costs; and as § 305 provides that "costs *shall* be allowed, of course, to the defendant in the actions mentioned in the last section, unless the plaintiff is entitled to costs therein," it seems to me equally clear that the judgment in this action, in favor of the defendant, was properly entered, and the motion to vacate it must be denied.

The plaintiff appealed from the order entered upon this decision, to the general term.

Richard M. Harrington, for the appellant.

————, for the respondent.

BRADY, J.—In addition to the opinion of Judge HILTON at special term, it is only necessary to say, that this is not a case of which a justice would have no jurisdiction under section 54 of the Code.

1st. It is not a matter of account between the parties. The defendant had no claim against the plaintiff. He had a claim against the payee of the note sued upon, and the note, having been transferred after maturity, was taken by the plaintiff sub-

ject to equities existing in favor of the maker, who is the defendant.

2d. It is not a case where the recovery exceeds the sum of two hundred and fifty dollars. The first subdivision of the third section of the Act to reduce the several acts relating to the district courts into one act, passed April 13, 1857 (Laws 1857, vol. 1, p. 707), confers jurisdiction upon the district courts, in a matter of account, where the *recovery* does not exceed $250, "notwithstanding the accounts of both parties may exceed $400." The jurisdiction is based upon the sum recovered. The sum recovered here is $26.34.

DALY, First Judge.—As the plaintiff, by the 4th subdivision of the 304th section, is not entitled to costs, it follows, in my judgment, as a matter of course, from the 305th section, that the defendant is entitled to costs. The 4th subdivision of section 304 declares, in effect, that the prevailing party shall not recover costs in actions for the recovery of money, unless he recover fifty dollars or more, and the next section, 305, provides that if in such an action the plaintiff is not entitled to costs, that costs shall be allowed to the defendant. These two sections are clear and explicit, and are not controlled by anything contained in section 303.

Order appealed from affirmed, with costs.

JULES VANTROT *v.* JACOB MCCULLOCH AND WILLIAM MCINTOSH.

The holder of a bill of exchange payable on demand, when he seeks to charge the drawer, is bound to show it to have been presented for payment within a reasonable time, or that the drawer has sustained no injury by the delay.

What is a reasonable time within which the presentment should have been made, is a question of law for the court, to be determined by the circumstances of each particular case.

A bill of exchange, drawn at Wellesville, Ohio, on parties in New York, was retained

by the payee nine or ten days before being sent on for presentment. When presented, the drawees having failed two days previous, payment was refused.

Held, that the delay was unreasonable, no special circumstances being shown to excuse it, and the drawers were therefore discharged.

APPEAL from a judgment of the District Court for the first judicial district. The action was brought on a draft or bill of exchange, drawn by defendants at Wellesville, Ohio, in favor of the plaintiff, a resident of Ohio, on Atwood & Co. of New York. It appeared that the plaintiff had retained the bill some nine or ten days before sending it on to be presented. It was finally presented to the drawees, but they had failed two days before the presentment, and payment was therefore refused. The justice rendered judgment for the plaintiff, and defendants appealed.

The principal question discussed on the appeal was, whether there had been such a delay in the presentment of the draft as would discharge the drawers.

William Stanley, for the appellant.

The plaintiff has been guilty of laches, and has thereby made the check his own. He should have forwarded it to his correspondent in New York the day after he received it, at furthest; and it should have been presented to the drawees the day after it arrived in New York, at the furthest. The authorities are uniform to this effect. *Buckingham* v. *Gower*, Holt. N. P. 313, n.; *Maule* v. *Brown*, 4 Bingh. N. R. 266; *Alexander* v. *Burckfield*, 7 Mann. & Gr. 1061; *Mohawk Bank* v. *Broderick*, 10 Wend. 304; 13 id. 133; *Gough* v. *Staats*, 13 Wend. 549; *Smith* v. *Janes*, 20 Wend. 192; *Veazie Bank* v. *Winn*, 40 Maine, 60; Byles on Bills, (7 ed.), 18.

Lyman Abbott, for the respondent. The following cases fully sustain the justice in his holding that the plaintiff had not delayed an unreasonable time in presenting the bill. *Aymar* v. *Beers*, 7 Cow. 705; *Vreeland* v. *Hall*, 2 Hall, 429; *Robinson* v. *Ames*, 20 Johns. 146; *Gowen* v. *Jackson*, 20 Johns. 176; *Brower* v. *Jones*, 3 Johns. 230; *Sice* v. *Cunningham*, 1 Cow. 397; *Mohawk Bank* v. *Broderick*, 10 Wend. 304.

By the Court, HILTON, J.—The defendants are sued as drawers of a draft or bill of exchange, dated August 14, 1857, at Wellesville, in the state of Ohio, upon Atwood & Co. of this city, payable on demand to the order of the plaintiff, by whom it appears to have been retained nine or ten days, and then sent on by him for collection. It was presented to the drawees for payment on August 31st, and payment refused, they having failed and stopped payment on the 29th, with more than sufficient funds of the drawers in their hands to pay it, had it been presented prior to their failure. Both parties reside in Ohio, about 400 miles distant from this city, and between which and their respective places of residence there is a daily mail.

Upon these facts the justice of the first district gave judgment for the plaintiff, and the defendants appeal on the ground that they are discharged from liability upon the draft by the unreasonable delay of the plaintiff in presenting it for payment.

By an inspection of the indorsements upon the bill, it might be presumed, in the absence of any evidence upon the point, that it had been negotiated by the plaintiff before presentation; but any such presumption seems to be repelled by the proof that the plaintiff had forwarded it for collection.

The object for which the bill was drawn or purchased, or the condition of the plaintiff at the time of its purchase, or since, does not appear, nor is any explanation given, or excusing circumstances disclosed, in respect to the delay in demanding payment, and therefore the naked question presented for our determination is, whether there has been such an unreasonable delay on the part of the plaintiff in demanding payment, as, when unexplained, should exonerate the defendants from liability?

It has long been settled law, that a holder of a bill payable on demand, when he seeks to charge the drawer, is bound to show it to have been presented for payment within a reasonable time, or that the drawer has sustained no injury by the delay. Story on Bills, § 325; Kyd on Bills, 120; Bayley on Bills, 220; Byles on Bills, 152; 3 Kent's Com. 91; Parsons' Mer. Law, 90; Edwards on Prom. Notes, 392; *Commercial Bank* v. *Hughes*, 17

Wend. 94; *Mohawk Bank* v. *Broderick*, 10 id. 304; *Little* v. *The Phœnix Bank*, 2 Hill, 425; *S. C. affirmed*, 7 id. 359; *Kelley* v. *Mayor of Brooklyn*, 4 id. 263; *Fry* v. *Hill*, 7 Taunton, 396; *Robinson* v. *Hawksford*, 9 Adol. & Ellis, 52. And what is a reasonable time within which the presentment should have been made, is, whenever the point arises, a question of law for the court, to be determined by the circumstances of each particular case. *Furman* v. *Haskin*, 2 Caines, 369; *Robinson* v. *Ames*, 20 John. 146; *Gowan* v. *Jackson*, id. 176; *Sice* v. *Cunningham*, 1 Cowen, 397; *Aymar* v. *Beers*, 7 id. 705; *Vreeland* v. *Hyde*, 2 Hall S. C. R. 429; *Harker* v. *Anderson*, 21 Wend. 372; Edwards on Bills and Notes, 391.

Here the plaintiff has shown no excusing circumstances whatever for his delay in not making the demand prior to the failure of the drawees, which occurred fifteen days after he received the bill, affording a space of time much more than sufficient or necessary to have had it forwarded to this city and presented for payment. The delay was therefore unreasonable, and the defendants should not be held responsible for the consequences of such unexcused neglect. By it they were exonerated from liability, and the judgment of the justice was erroneous.

Judgment reversed.

MARTIN AND FREDERICK MAAS *v.* HENRY AND EDWARD GOODMAN.

A general assignee for the benefit of the creditors of an insolvent is not to be regarded as a purchaser for a valuable consideration, in respect to the property assigned, but holds it subject to the same equities which existed against it at the time of the execution of the assignment.

In an action brought by him to recover a debt thus assigned, any set-off is available as a defence which might have been interposed had the suit been brought in the name of the assignor, and whatever would be a valid defence against the claim in the hands of the assignor, is equally so to an action by the assignee.

Where a suit was brought by the general assignees of an insolvent firm for goods sold upon a credit, to the defendants by the firm, prior to the assignment, and it appeared that at the time of the assignment the defendants held a note of the firm maturing before the credit upon which the goods were sold, expired; *Held*,

I. That the assignee was not a purchaser for a valuable consideration of the claim sued upon, and therefore succeeded only to the rights of the insolvent assignor.

II. That the note thus held by the defendants constituted a valid set-off against the demand in suit.

The case of *Keep* v. *Lord* (2 Duer, 78,) examined and disapproved.

APPEAL from a judgment in favor of the plaintiffs given at the special term. The action was brought to recover for goods sold and delivered by Strauss & Emanuel Brothers, on September 1st, 1857, to the defendants, upon a credit of six months. At the time of the sale the defendants held a note of Strauss & Emanuel Brothers, having about three months to run, for an amount exceeding the price of the goods purchased. On September 12th, 1857, Strauss & Emanuel Brothers, being insolvent, made a general assignment of their property for the benefit of creditors, to the plaintiffs, who as such assignees commenced this suit in March, 1859, after the credit upon which the goods were sold had expired. The note held by the defendants then being due, they set it up in their answer as a set-off against the claim for the price of the goods. At the trial, the presiding judge excluded the set-off, and gave judgment in favor of the plaintiffs for the amount claimed. The defendants appealed.

Israel T. Williams, for the appellant.

I. The Code (§ 112,) provides that assignees shall take subject to any set-off that existed at the time of the assignment, or at the time notice of the assignment is brought home to the defendant. This provision, however, refers to assignees who purchase in good faith for value, and without notice. This appears from the reading of the section itself; from the provision in reference to notice, from the exception as to negotiable paper, and from the provision that even in case of negotiable paper the transfer must be made in good faith, upon good consideration, and before maturity. It is a universal principle of law that a transferee

of any property whatsoever, with full notice of the facts, stands in every possible respect in the shoes of the assignor.

II. To understand the case now before the court, it is necessary to inquire: 1. Had the action been brought by the assignor (no assignment having ever taken place,) could the note offered on the trial have been set off against the plaintiff's claim? That it could have been, will be seen from the following facts, which distinctly appear in the case: The note (which bears date February 24, 1857) was bought by the defendants on the 31st day of August, 1857. The goods for which the action is brought were sold by the assignor to the defendants on the 1st day of September, 1857. The note fell due December 27, 1857. The claim on which the suit was brought fell due March 1, 1858. 2. Does the assignee take any higher, different or other rights by virtue of the assignment than the assignor had, or could have had, had the assignment not been made? That he does not, will appear from the following facts and considerations: The assignment was general, conveying all the property of the assignors, including the demand in the complaint referred to, to the assignee, in trust for the benefit of the creditors of the assignors. Such general assignee takes no beneficial interest in the claim, but is invested in equity only with a power, trust or agency, to take the property of the assignor, convert it into money, and distribute the money as directed by the assignor, in the deed of trust or power, among the creditors of the assignor. 11 Barb. 471; 18 Barb. 409. All this is to be done by the assignee for the benefit of the assignor; he is appointed to this office solely by the assignor—it is the voluntary act of the assignor, pursuing his own interest, and executing his own wishes, without consulting with or being influenced by his creditors, the assignee, or any other person. The assignee takes the property with the implied promise, and charged with the duty, of applying it to the use of the assignor. In the discharge of his duty, he applies the property to the use of the assignor, as truly as if he were appointed an agent, or sent as a servant with money in his hand to pay a specified debt of his principal or master. See Burrill on Assign-

ments, 438; also see 5 Watts and Serg. 145; 2 Iredell's Equity, 382; 11 Alabama, 880; 6 Johnson's Ch. 437; 2 Paige, 567; 11 Alabama, 1067; 5 Strobhart, 144; 3 Grattan, 73; 2 Barb. S. C. 258; 5 Barr, 377. The cases of *Beckwith* v. *The Union Bank*, (5 Seld. 212), *Watt* v. *The Mayor, &c.*, (1 Sandf. 23), and *Stewart* v. *Wells*, (3 Barb. 40), are all clearly distinguishable from the case now before the court.

III. This court, in the exercise of equity powers, may set off a sufficient amount of the note to cancel the plaintiff's claim, irrespective of any statutory provision, and ought to do so. *Lanesborough* v. *Jones*, 1 P. Will. 326; *Simpson* v. *Hart*, 14 Johns. R. 63. 1. The defendant is entitled in this action to the same equitable relief that he would be entitled to, had he filed a bill for relief in equity. *Marquat* v. *Marquat*, 2 Kern. 336; *Crary* v. *Goodman*, 2 Kern. 266; *Roosevelt* v. *Bank of Niagara*, 1 Hopkins R. 579. 2. Whenever, in the progress of any suit, a case arises for the application of equitable principles, this court is as much bound to apply those principles for the relief of a party, as was the Court of Chancery in a case properly cognizable in such court, where such relief was specifically prayed for. *Giles* v. *Lyon, adm'r, &c.*, 4 Comst. 599; *Crary* v. *Goodman*, 2 Kern. 266. 3. Courts of law always had and exercised the power of setting off judgments against each other. This power before the Code was exercised by the courts of equity "*ex gratia curiæ.*" In courts of law it was "*ex debito justitiæ.*" Now that both jurisdictions are blended in one, this relief may be asked as a favor or as a right, as the case may require. 4. The assignor is shown to be insolvent. The plaintiff's whole claim rests upon the admission of this fact, for otherwise the assignment would be void, and the plaintiff could not maintain the action at all.

E. F. Brown, for the respondents.

BRADY, J.—The case of *Keep* v. *Lord*, (2 Duer, 78), which was not cited on the argument, is decisive upon the questions

involved in this appeal, unless it be held that the plaintiff stands in precisely the same condition as the assignor, or in other words, unless it be held that this is an action in effect by the assignor himself. Judge BOSWORTH has, in the case referred to, fully and ably reviewed the cases bearing upon the doctrine of equitable set-offs submitted on this appeal, and has arrived at the conclusion that it does not apply in such a case as this. He has based his decision, however, upon the ground, among others, that it is not a suit between the assignor and the defendants, but between the assignee and the defendants, treating the assignee as a *bona fide* purchaser, or at least as a person who could not be affected by a set-off which would be good against his assignor. And herein, in my judgment, lies the error in the conclusion at which he arrived. The debt in the case of *Keep* v. *Lord*, set up by the defendant as a set-off, became due prior to the debt sued upon, and such is the case here. The defendant's set-off was due prior to the claim prosecuted by the plaintiff. If the assignor were the plaintiff, the set-off would be valid under the statute, and such would have been the case if the assignor had been the plaintiff in *Keep* v. *Lord*. In that case, however, the question whether the assignee for the benefit of creditors is a *bona fide* purchaser, or can be regarded as other than a mere representative of the assignor, does not appear to have been considered. It seems to me, on principle, that he cannot be considered as a purchaser. He parts with nothing, and the *cestui que trusts* neither yield a security nor give a new consideration. *Root* v. *French*, 13 Wend. 570; *Coddington* v. *Bay*, 20 John. 651; *Clark* v. *Flint*, 22 Pick. 231. He is the agent or trustee appointed to gather the estate of the assignor, and distribute it among the creditors in the manner directed by the assignment. He takes the place of the assignor in reference to the estate, and when he enforces a claim, does it not as a purchaser innocent or *bona fide*, but as the attorney or trustee of the assignor, standing in his place, enforcing his rights only, and being entirely devoid of any personal or private interest or title. The creditors are not parties to the deed of assignment. They

are under no obligation to conform to its provisions or accept its benefits, and as between them and the plaintiff there is neither privity of contract nor privity of estate. The assignee occupying the position stated, whatever would be a defence against his assignor, would be a defence against him, and the existence of a demand in favor of the defendant, due at the time the debt matured against him, would be a set-off under the statute. I consider the following cases illustrative of the rule that a general assignee of a debtor in failing circumstances stands in precisely the same condition as the debtor himself. *Ferris* v. *Dennison*, 11 Ala. 235; *Clark* v. *Flint*, 22 Pick. 231: *Knowles* v. *Lord*, 4 Whar. 507; *Leuchenbach* v. *Breckenstein*, 5 W. & Serg. 149: *Leger* v. *Benoffe*, 2 Barb. S. C. 475: *In re Howe*, 1 Paige, 128: *Happerty* v. *Palmer*, 6 Johns. C. R. 437; *Pierson* v. *Manning*, 2 Mich. Gibbs, 453. SERGEANT, J., in *Knowles* v. *Lord*, says that a voluntary assignment by a debtor has never been considered as placing the assignee in any other situation in point of equity than the assignor; and in *Pierson* v. *Manning*, the doctrine that such an assignee was in legal contemplation a purchaser for a valuable consideration, was denounced by PRATT, J., as an absurdity. He says that assignees under voluntary assignments are naked trustees having no real interest in the transaction, and they are not purchasers in fact. See also Story's Eq. § 1228. Regarding the plaintiff, then, as standing in the same condition as his assignor, not as a purchaser, but as a trustee or representative, and in no better situation than the assignor, I think the set-off should have been allowed, and that the judgment should be reversed.

HILTON, J.—My ruling at the trial was from a recollection of adjudged cases, (3 Barb. S. C. 40; 4 Sand. S. C. 604; 2 Duer, 78); and the views expressed in the above opinion were not presented. Upon reflection, I am satisfied that the ruling was erroneous, and I concur in reversing the judgment upon the grounds stated by my brother BRADY.

DALY, First Judge.—Since the above opinion was written, the

17th volume of New York (3 Smith) Reports has appeared, containing two cases, *Van Heusen* v. *Radcliff* (p. 580,) and *Griffin* v. *Marquardt* (p. 28,) in which it has been held, in accordance with the views of Judge BRADY, that an assignee for the benefit of creditors is not, in respect to the assigned property, a purchaser for a valuable consideration; and the first of these cases may be regarded as determining the question finally in this state.

Judgment reversed.

HORATIO REED *v.* JOHN W. WARTH.

On the return of a summons issued from a district court, the parties appeared, put in their pleadings, and by consent adjourned the trial of the action to take place before the justice at his private office, which was located outside of the district for which he was elected. On the adjourned day the justice was absent, whereupon the parties went before the justice of another district, who tried the cause upon the pleadings thus put in, and gave judgment. *Held*,

I. That where the action is tried before a justice of a district other than the one in which the court is held, the return on appeal must show affirmatively that the justice of the district was at the time absent from the usual place of holding the court, or unable to hold it from illness.

II. The power given, by section 6 of the District Court Act, (1 Laws 1857, 707), to a justice to hold court in another district than the one to which he is elected, being new, must be strictly followed, and the facts authorizing its exercise must appear by the return.

III. The non-attendance of the justice before whom the action was commenced, at the adjourned day, operated as a discontinuance, and the subsequent proceedings before another justice were *coram non judice* and void.

This was not a case of voluntary appearance of the parties within section 10 of the act, because the pleadings were put in before a justice of a district other than the one who tried the cause.

Whether a justice can in any case proceed with the trial of a cause commenced before him, at a place outside of the district for which he is elected, without rendering his subsequent proceedings in the action void. *Quere?*

APPEAL by defendant from a judgment of the justice of the First District Court. The return showed that the action was com-

menced by a summons returnable before the justice of the fourth district, at his court room, in First avenue, in the city of New York. On the return day of the summons the parties appeared, and the defendant put in an answer. Several adjournments were thereafter had, until, at length, the cause was adjourned by consent, "to be tried *at the office*" of the justice of the fourth district, at No. 78 Nassau street. On the adjourned day the parties attended at the office of the justice, but he was absent; and they thereupon went voluntarily before the justice of the first district, at his court room, No. 80 Nassau street, and submitted the cause to him upon the pleadings already in. He tried the cause and rendered the judgment now appealed from. It did not appear by the return that at the time of the trial the justice of the fourth district was either sick, or "absent from the usual place of holding his court."

The principal question discussed upon the appeal was, whether the justice of the first district had any jurisdiction of the cause.

Robert E. Topping, for the appellant.

I. The justice of the first district acquired no jurisdiction, and the proceedings before him were *coram non judice* and void for the following reasons: 1. A justice of one district court can hold the court of another district only in the following instances: When his office is vacant; when he is absent from the usual place of holding his court, or unable from illness to hold the same. District Courts Act of 1857, § 6. None of the above conditions existed, as appears from the return. 2. The cause was tried out of the Fourth District, viz., at 82 Nassau street. The Fourth District Court must be held within the district at the place appointed by the corporation of the city of New York. District Courts Act, § 7.

II. Courts of justices of the peace are strictly confined to the authority given them by the statute, and must show the power given them in every instance. *Jones* v. *Reed*, 1 Johns. C. 20, 1 Caines, 594; *Wells* v. *Newkirk*, 1 Johns. C. 228; *Way* v. *Carey*, 1 Caines, 191.

III. The power of a justice of the First District Court to hold the court of any other district, is a new power conferred by the act of April 13th, 1857, of the Legislature. Where a new power is given, he must proceed in the mode and in accordance with the act. *Bigelow* v. *Stearns*, 19 Johns. 39.

IV. Where a justice has no jurisdiction whatever, and undertakes to act, his acts are "*coram non judice*" and void. *Butler* v. *Potter*, 17 Johns. 45.

V. A defect of jurisdiction in a justice is not cured by the defendants appearing and going to trial. *Low* v. *Rice*, 8 Johns. 409.

VI. The judgment is clearly against the weight of evidence, so as to warrant the inference of *misapprehension*, *bias*, *mistake*, *partiality*, or *undue influence* on the mind of the justice who rendered it.

W. C. Carpenter, for the respondent.

By the Court, HILTON, J.—This action was commenced by summons returnable before Justice William H. Van Cott, of the fourth district, at his court room, No. 73 First avenue, and was tried before the justice of the first district at his court room, No. 82 Nassau street, who rendered a judgment for the plaintiff, and from which the defendant appeals.

The return of the justice of the first district states that on the return of the summons the parties appeared by counsel, an answer was put in, and, after several adjournments by consent, "the cause was further adjourned until the 10th day of May, 1858, at one o'clock in the afternoon, to be tried at the office of Justice Van Cott, No. 78 Nassau street, in the city of New York. On the said tenth day of May, 1858, Justice Van Cott being absent, the counsel for the plaintiff and defendant consented to try said cause before the undersigned at the court room (No. 82 Nassau street) for the first judicial district."

Upon the face of the return, therefore, the question is presented, whether the justice of the first district acquired any

[illegible]

[illegible] by reason of the absence of Justice [illegible] office [illegible] First street in the city of [illegible] was adjourned.

The power of a justice to hold his court in a place other than that in which he is elected is given by section [illegible] of the act relating to the several courts in the city of New York and the act passed April 13, 1857 (Laws 1857, p. [illegible]), which provides that "the justices elected in each district may hold the court therein, and if either be unable to be present from the usual place of holding the court or unable from illness to hold the same it may be held by a justice elected in another district."

The power was given, being new, it follows that it must be strictly pursued, and unless the justice who tried the cause acquired the right to do so under the provisions of this section his acts were coram non judice and void. *Bidder* v. *Place*, 17 John. 147. *Harwood* v. *Bonghton*, 5 Wend. 170; and by the non-attendance of Justice Van Cott at the adjourned day, the action was discontinued. *Stoddard* v. *Holmes*, 1 Cowen, 245.

This is not a case commenced by the voluntary appearance of the parties and pleading before the justice, without summons, under section ten of the act of 1857 (*supra*,) because it appears that the pleadings were had before the justice of the fourth district; and as the return does not show that justice to have been absent from the usual place of holding his court on the day to which the case was adjourned, it is very clear that the justice of the first district acquired no jurisdiction whatever to try the action, and his acts were entirely void. *Dudley* v. *Mayhew*, 3 Comst. 9.

The office of Justice Van Cott was not the usual place of holding his court—the place appointed for that purpose being his court room in First avenue,—and although it is not necessary, after having arrived at the conclusion above stated, to determine whether a justice can in any case proceed with the trial of a cause commenced before him at a place outside of the district for which he is elected; yet I entertain great doubt whether he

can do so without thereby rendering his subsequent proceedings in the action void. See act of 1857 (*supra*,) §§ 1, 4, 7, 6; *Burckle* v. *Ekhart*, 3 Comst. 132; Coke Lit. 125, *a*, *b*.

A remaining ground of appeal is, that the judgment rendered is against the clear and decided weight of the evidence, and were I not satisfied that the justice who tried the case acquired no jurisdiction over it, I would favor the reversal of the judgment on this ground alone.

Judgment reversed.

Thomas Leavy v. Edward Roberts.

A new trial will not be granted on the ground of newly discovered evidence, where the additional testimony disclosed might have been discovered by the party in time for the trial if he had used due diligence in the investigation and preparation of his case.

Thus, where the defendant moved for a new trial on the ground of newly discovered evidence, which he desired to use to rebut testimony given by the plaintiff at the trial, and it appeared that one of the witnesses whose testimony was newly discovered was the defendant's son, and another was present in court during the trial, and known to defendant to be cognizant of dealings between the parties involved in the suit; and it also appeared that the reason defendant did not inform himself of the testimony which could be obtained from these witnesses was that he did not anticipate such evidence as was given by the plaintiff; *Held*, that the defendant had not used due diligence, and was not entitled to the new trial asked.

The tests by which cumulative evidence is to be distinguished, considered.

If the newly discovered evidence disclosed on a motion for a new trial relates to any fact proved on the trial, whether bearing upon the issue directly or collaterally, the evidence is cumulative, and the motion will not be granted.

Appeal from an order at special term denying a motion for a new trial made upon the ground of newly discovered evidence. The action was to recover for certain marble mantels alleged to have been sold to the defendant; and, also, for the labor and materials used in putting them up in eight houses belonging to him in Thirty-sixth street, in the city of New York, and built

[illegible]

[illegible]

The opinion at special term was as follows:

Brady, J.—The motion for a new trial on the ground of newly discovered evidence must be denied for two reasons, namely:

The evidence is cumulative, and the defendant has been guilty of a want of diligence.

The question presented and controverted on the trial was whether the defendant was indebted to the plaintiff as charged in the complaint, upon a contract made between him and the plaintiff. The defendant, who was examined on his own behalf, after the examination of the plaintiff, denied that he had contracted as charged. The plaintiff then offered rebutting testimony, which, being corroborative of the plaintiff's statement, was deemed controlling by the presiding judge. The defendant, in one of his affidavits used on this motion, states that "he was not aware of the nature of the rebutting testimony at the *time of the trial*, not having taken *any pains* to inform himself; not imagining the possibility of such erroneous testimony on the part of the plaintiff and the witness Cronk;" and, upon the allegation of a discovery of evidence bearing upon the question involved, asks a new trial. One of the witnesses, whose evidence is said to have been so discovered, is the son of the defendant.

Another witness, J. M. Grenell, was in court during the trial, attending there on behalf of the plaintiff; and the third, Buckbee, reveals certain acts and declarations by the plaintiff inconsistent with the claim made against the defendant. It also appears that Grenell was known to the parties in connection with the work and labor done by the plaintiff, and that the evidence of the defendant's son relates to an interview between the plaintiff and the defendant, in which the plaintiff committed acts and made declarations inconsistent with the claim made against the defendant. It would seem, that in reference to Grenell and the defendant's son, that the defendant was guilty of negligence in not procuring their testimony, or in not making any efforts to ascertain what either of them knew of the controversy, and the truth of the defendant's statement that he had not taken "any pains to inform himself" is shown without the admission which he makes. That he was not diligent in preparing his defence is very clear, and this alone excludes him from any consideration on a motion of this kind. It would be establishing a grievous precedent, and one of great public inconvenience, to interfere in any other case than one of indispensable necessity and wholly free from negligence. Per Chancellor KENT. *Floyd* v. *Jayne*, 6 Johns. Ch. Rep. 482. There is, however, still another reason why the motion should not be granted as before suggested. The testimony discovered is cumulative. It is said by MARCY, J., in *Guyot* v. *Butts*, 4 Wend. 579, that the kind and character of the facts, makes the distinction between what is cumulative evidence and what is not, and that the facts may tend to prove the same proposition and yet be so dissimilar in kind as to afford no pretence for saying they are cumulative.

It does not appear distinctly by any adjudication in this state what is meant by cumulative evidence in its bearing upon motions of this kind, and it is difficult, perhaps, to determine what is cumulative, and what is not, by any general definition. A series of facts may be established, all tending to prove a claim or defence, and yet a fact not proved, having the same effect, may be discovered after the trial The evidence in the latter case

may be said to be cumulative so far as it relates to the main fact or facts in issue; but it clearly is not as to the subject it embraces. It is evidence of a fact not proved, and, therefore, not controverted; and this, I think, is what Judge MARCY suggests in the quotation above. If the evidence be cumulative because it relates to the issue, or one of the issues, about which any proof has been given, then a new trial upon newly discovered evidence would be an impossibility; but if the rule be that newly discovered evidence of some material fact relevant to the issue, and which was not proved or controverted on the trial, is not cumulative, then there may be many cases in which a new trial would be a matter of justice. This I understand to be the guide on questions of this kind. If, therefore, the evidence relates to any fact proved, whether bearing upon the issue directly or collaterally, it is cumulative; and such I understand to be the character of the new evidence disclosed on this motion. The plaintiff, by his statement on the trial, was shown to have committed acts and made declarations inconsistent with the alleged contract between him and the defendant, and which, unexplained or uncontrolled, would, perhaps, be sufficient to prevent his recovery. The evidence discovered is of the same complexion. It affects the validity of the plaintiff's claim so far as it proves conduct at variance with the claim set up here, and nothing more. *People* v. *The Superior Court*, 10 Wend. 286. There are cases in which a contrary rule has been applied, but they are exceptions to the general maxim, and distinguished by very peculiar circumstances, calling for the exercise of a very liberal discretion. This is not one of those cases. There are, it is true, conflicting elements here, and perhaps the statements of the parties are irreconcileable; but these features are common to the great majority of cases, and more particularly since the law of the land has given to the parties the right to be examined on their own behalf. In cases where they are so examined, the rules which govern motions for a new trial on the ground of newly discovered evidence should be applied strictly, in my opinion.

Motion for new trial denied.

Cummins, Alexander & Green, for the appellant.

I. The important question at the trial was, as to whether the defendant actually purchased the mantels put up, or whether they were sold to Cronk, the person who built the houses. Upon this point the testimony, now for the first time discovered, would establish the fact that the sale was made to Cronk, the builder, and not to the defendant.

II. It would be aiding justice by permitting a new trial, so that this testimony might be given, and the defendant relieved from the effect of the unexpected testimony of the plaintiff.

III. The new evidence of the admissions of the plaintiff respecting the sale, and the name of the person to whom he made out the bill, is not cumulative, no testimony upon this point having been given or offered at the trial. Cumulative evidence is that which only heaps up additional proof respecting a fact in the case, as to which evidence has been already given. *Acker* v. *Burns*, 3 Wood & Minot, 357; *Waller* v. *Graves*, 20 Conn. 310; *Parker* v. *Hardy*, 24 Pick. 248; *Guyett* v. *Butts*, 4 Wend. 579; *The People* v. *N. Y. Superior Court*, 10 Wend. 285.

IV. There was no want of diligence at the trial. The defendant was misled by supposing that the plaintiff would not testify to a state of facts directly contrary to those established and sworn to by the defendant.

John Graham, for the respondent.

I. All the testimony pretended to have been discovered after the trial of the action, could have been obtained, with reasonable diligence, for the trial.

II. The whole of the pretended testimony is cumulative. It bears upon the defendant's liability, and that was the point litigated upon the trial. *The People* v. *The N. Y. Superior Court*, 10 Wend. 294.

III. It merely tends to contradict the evidence upon which the plaintiff succeeded. *The People* v. *The N. Y. Superior Court*, 10 Wend. 286; *Fleming* v. *Hollenback*, 7 Barb. S. C. R. 271; *Fellows* v. *Emperor*, 13 id. 92; *Mason* v. *Cockroft*, 3 Duer, 366.

are authorities showing that the defendant exhibited no reason for a new trial.

IV. That the defendant did not remember the facts his pretended witnesses could state, was and is no excuse. Shortness of memory is his misfortune. 10 Wend. 288; 7 Barb. S. C. R. 271.

V. The newly discovered evidence of a witness, impeached by the affidavits used to resist the application for a new trial is no ground for a new trial. 7 Barb. S. C. R. 276.

HILTON, J.—It was the duty of the defendant to have come prepared, at the trial, with the evidence which he now claims to have "newly discovered." It is quite obvious that slight diligence or inquiry would have informed him of all the facts within the knowledge of the architect and carpenter of the buildings, the furnishing of materials for which was the subject of the trial.

His negligence in this respect affords no ground for relief, and for this, and the additional reasons stated in the opinion of Judge BRADY at special term, the order appealed from, denying the motion for a new trial, is affirmed.

Order affirmed with costs.

MALCOLM CAMPBELL, RECEIVER, &c., OF MARY E. FOSTER *v* GEORGE C. GENET.*

A receiver appointed in proceedings against a judgment debtor supplementary to execution, acquires title only to the property and estate which belonged to the debtor at the time the proceeding was instituted by granting the order for his examination.

To entitle a set-off or counter claim to be allowed, it must be shown to be due to

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* Judge HILTON, having been counsel in this case, took no part in its decision.

the defendant in his own right, either as the original creditor or as the assignee or owner of the demand set up.

A debt owing to the defendant jointly with another, cannot be set off in an action upon a demand against the defendant alone. A joint debt cannot be set off against an individual one.

A new trial will not be granted upon the ground of newly discovered evidence, where it appears that the existence of the evidence might, with reasonable diligence, have been ascertained at the time of the trial.

APPEAL from a judgment entered upon a report of Hamilton W. Robinson, Esq., referee, in favor of the plaintiff. The action was brought by the plaintiff, as receiver of Mary E. Foster, appointed by a judge of this court upon supplementary proceedings founded on a judgment, recovered against her in favor of A. T. Stewart & Co., for over $3,000. The complaint alleged that the defendant, acting as agent for Miss Foster, had received from the trustees, under her father's will, moneys which he had not paid over or accounted for, and asked to have the amount in his hands paid over to the receiver of her property, to be applied in extinguishment of her debt on the judgment. The answer denied that the defendant had received the amount alleged in the complaint, and set up, as an off-set against any balance in his hands, professional services as a lawyer, rendered by him in the management of her affairs.

The supplementary order, requiring the defendant to appear and be examined concerning her property, was granted April 15th, 1857. She appeared pursuant to it, submitted to an examination, and on June 9th, 1857, the plaintiff was appointed receiver of her property and effects. The referee found the following facts established at the trial before him:

"That the defendant, from time to time, between the fifth day of February, 1856, and the fourteenth day of May, 1857, received from Anthony Hoguet, trustee under the will of James Foster, Jr., deceased, of Mary E. Foster, and as her agent, the sum of thirty-eight hundred and seventeen dollars and eighty-two cents; that he had paid over to the said Mary E. Foster, or to and for her use and benefit, the sum of thirty-five hundred and thirty-three dollars and fifty-two cents, and that a balance of two hun-

and that right to the said fifty cents of said moneys so received by said defendant is the sole and separate property of said Mary E. Foster, and it was due to her on the fourteenth day of May, 1857, the time of the commencement of this action. That the professional services mentioned and referred to in the answer, and for which he claims the right to retain the moneys in his hands, were not rendered by the defendant, but by the firm of G. C. & E. J. Genet, of which the defendant was a member, and that he had not shown any individual right to recover thereon, or to retain any of said moneys for the payment or satisfaction of the claims of that firm for such services."

On this report, judgment was entered in favor of the plaintiff for $97.50, and the defendant appealed, making the following exceptions to the finding of the referee:

First. That the referee included in his finding an item of $100, on the 4th day of May, 1857, and an item of $500.50, on the 14th day of May, 1857, moneys of Miss Foster, which accrued to her, and were received by defendant subsequent to the order for the examination of Miss Foster on proceedings supplementary to execution under which the plaintiff was appointed receiver.

Second. That the referee had not allowed defendant the benefit of the claim of G. C. & E. J. Genet for services, as a defence to plaintiff's claim to moneys in his hands. *Third.* That the finding of facts by the referee was contrary to the evidence.

George C. Genet, appellant, in person.

I. Proceedings supplementary to execution are a concurrent remedy with a creditor's bill. It is a cumulative remedy; and the office of either is to sequester property belonging or money due to a judgment debtor, and which the debtor refuses to apply to the payment of a judgment debt. It is an equitable execution; and the making and service of the order attaches the property or money to which it applies—the subsequent proceedings are those pointed out by the law—to convert the property thus levied on into money, and to apply it to the satisfaction of the demand. The Code expressly confines the proceeding to

money due or property belonging to the judgment debtor. § 297. Property and money acquired by the judgment debtor after the commencement of the proceedings, whether under the Code or a creditor's bill, do not pass to the receiver. *Caton* v. *Southworth*, 13 Barb. 337; *McCormick* v. *Kehoe*, 7 Legal Obs. 184; *Stewart* v. *Foster*, 1 Hilton, 505; *Campbell* v. *Foster*, 16 How. Pr. Rep. 275; 2 Barb. Ch. Prac. 153; *Browning* v. *Bettis*, 8 Paige, 572.

II. The referee should have allowed the counter claim set up in the answer. There was no reply, and consequently it must be taken as true. Code, § 168.

Woodbridge Hudson, for the respondent.

I. The title of the receiver is of the date at which it is ordered that a receiver shall be appointed. *Steele* v. *Sturges*, 5 Abbott Pr. R. 442; *Wilson* v. *Allen*, 6 Barb. S. C. R. 543; *Mann* v. *Pentz*, 2 Sand. Ch. R. 258.

II. The claim of G. C. & E. J. Genet for services rendered to the judgment debtor, was properly excluded by the referee. "There must be mutual debts to authorize a set-off." *Duncan* v. *Lyon*, 3 Johns. Ch. R. 351, and authorities there cited. "Joint and separate debts cannot be set off against each other. They must be due to and from the same persons in the same capacity." *Dale* v. *Cook*, 4 Johns. Ch. R. 15. "The debt of three cannot be set off against two." *McGillivray* v. *Simson*, 2 Carr & Payne, 430; 2 R. S. 354, § 13, sub. 2.

III. If the finding of the referee as to the facts, be in any particular incorrect, it is in allowing too great a credit to the defendant.

Thus, he has allowed the defendant the full amount of $1,500 for fifteen months' allowance to Miss Foster, when it appears that she received in checks, payable to her own order, during that time, on March 25, 1856, one hundred dollars, and on June 25, 1856, one hundred and thirty dollars, and on April 3d, 1857, to bearer, which undoubtedly went direct to her, one hundred dollars, making $1,830 in all during the fifteen months. Yet

[illegible] receive in all [illegible] the filing of the [illegible] the defendant [illegible] charged [illegible] received 8. And [illegible] charged in Hoguet's ac- [illegible] $117.12, together [illegible] $1,371.12, the exact sum [illegible]

By the [illegible]—Supplementary proceedings were [illegible] in Foster on the 15th of April, 1857. The plaintiff in those proceedings, appointed a receiver on the 18th of June 1857. The latter was entitled to the income arising from the sum of $[illegible] under the will of her father, and the defendant had acted as her agent in collecting or receiving it for her from the trustee, Anthony Hoguet. The plaintiff alleged that the defendant had so received from Mr. Hoguet, between the 5th of February, 1856, and the 1st of May, 1857, the sum of $2,956.12, and had paid over to Miss Foster only $1,800, leaving in his hands belonging to her the sum of $2,156.12. The defendant proved various payments, and gave proof of a counter claim for services rendered. The referee rejected the counter claim, because it was not due to him in his own right, and allowed, in the account against the defendant, two payments made to him after the proceedings supplementary were commenced, and before the order appointing the plaintiff receiver was made, namely: $100 on 4th of May, 1857, and $306.82 on the 14th of May, 1857. The defendant objects to both these acts of the referee. The proof shows that the services upon which the set-off was based had been rendered by the firm of G. C. & E. J. Genet, of which defendant was a member, and there is no proof of the assignment of the interest of E. J. Genet to him, or of any authority thus to appropriate such interest. The referee very properly excluded the set-off for these reasons. The set-off must be due to the defendant in his own

right, either as being the original creditor or payee, or as being the assignee or owner of the demand. 2 R. S. 354, § 18, sub. 2

It was said on the argument that this set-off or counter claim was set up in the answer, and that, not being denied by the plaintiff, it must be admitted to be due. The answer to that proposition is, that, assuming the defendant's conclusion on the pleadings to be correct, he has waived his advantage by going into the proof of the counter claim, and by such proof showing that it could not have been properly set off against the plaintiff's demand. In reference to the second objection, there is no evidence in this case showing that Miss Foster was not entitled to all the moneys received by the defendant on the 15th April, 1857, when proceedings supplementary were commenced. Mr. Hoguet testifies that he received, from Feb. 6, 1856, to May 1, 1857, the amount hereinbefore stated, but he does not state, nor does it anywhere appear in the case, that the money so received was not due on the 15th April, 1857. The defendant did not set up the defence that the payments to him, on the 1st and 14th May, 1857, were made after the supplemental proceedings were commenced, or that the moneys received by him on those days were not due to Miss Foster until after those proceedings were commenced, and has equally failed to show that fact by proof on the trial. The will under which Miss Foster was entitled was not produced on the trial, and the character of the provision therein for her benefit, and the times and manner of the payments to be made to her, do not appear. If the defendant, who is a debtor of Miss Foster, desired to avail himself of the defence that the plaintiff, as receiver, was endeavoring to obtain property to which he was not entitled, it was his duty to place the facts constituting such defence before the court, and not leave it to inference. The question was not whether the defendant received the money after the proceedings were commenced, and before the order appointing the receiver was made, but whether the money received by the defendant, at any time before the commencement of this action, belonged to Miss Foster at the time the supplementary proceedings were commenced. The view

thus expressed of the second objection is predicated of the proposition that the receiver acquires title only to the property belonging to the judgment debtor at the time proceedings supplementary are commenced against him. Judge INGRAHAM, in *Stewart* v. *Foster*, (1 Hilton, 505), stated that proceedings supplementary were "limited to reaching the defendant's property in his possession, or in the possession of others and conceded to belong to him when the order is obtained," and this principle was also applicable to creditors' bills prior to the Code. *Caton* v. *Southworth*, 13 Barb. 337; *McCormick* v. *Kehoe*, 7 Legal Obs. 184; *Browning* v. *Bettis*, 8 Paige, 568; 2 Barb. Ch. Pr. 153; *McCam* v. *Dorsheimer*, 1 Clarke, 144; *Campbell* v. *Foster*, 16 How. P. R. 275.

But a creditor's bill was held to reach the rents and profits of the debtor's real estate, sold upon execution, for the fifteen months' possession after the sale to which he was entitled by law. *Farnham* v. *Campbell*, 10 Paige, 598. And also to reach an annuity given by will in lieu of dower. *Degraw* v. *Classon*, 11 Paige, 136.

The income of the fund provided by the will of the debtor's father, was the property of the debtor at the time of the commencement of supplementary proceedings, and, so far as it had accumulated on that day, could, under the authorities stated, be arrested and applied to the payment of the judgment against her on which such proceedings were based. A mere possibility could not be reached, (*Smith* v. *Kearney*, 2 Barb. Ch. R. 533), nor a salary not yet earned; but a salary earned before the filing of the bill, *though not payable*, could be reached. *Browning* v. *Bettis*, 8 Paige, 568.

If the defendant had shown that a part of the sum received by Mr. Hoguet, and paid over to him, was not due on the 15th April, 1857, we might, under the decision of this court at general term, (*supra*), have felt constrained to deduct so much of such income as had not accrued on that day.

For these reasons I think the second objection was not well taken, and that the judgment should be affirmed. The questions involved, aside from those herein considered, were ques-

tions of fact for the referee, and his finding seems to be correct. Upon the argument, by consent, an application was entertained for a new trial on newly discovered evidence, and the discovery consists of an alleged payment made by the defendant, for or on account of Miss Foster, which he had overlooked when he testified before the referee. It is sufficient to say, in reference to that, that knowledge of the payment could have been acquired by the defendant with reasonable diligence. If he had made the proper preparation for his defence, the item would not have been omitted. The case of *The People* v. *Superior Court of New York* (10 Wend. 285,) is conclusive upon the question presented. See also *Leavy* v. *Roberts*, *ante*, p. 285. The application must be denied.

Judgment affirmed.

JOSEPH W. GREENE *v.* SAMUEL WAGGONER.

In an action to recover the price agreed to be paid for the use of lodging rooms rented for a specified period, it is not necessary to show affirmatively an inability to rent the rooms, during the time the party hiring refused to occupy them.

The recovery in such a case, however, will be limited to the damages actually sustained, and where it is shown that any money has been or might have been obtained from the use of the rooms, for lodging purposes, by others, while they remained thus vacant, the recovery will be lessened accordingly.

But the burden of showing that anything has been, or might have been thus realized, rests upon the defendant.

The burden of proving a fact rests upon the party who asserts it; and especially is this so when he is to be benefitted by it when shown.

The case of *Wilson* v. *Martin* (1 Denio, 602,) examined and limited.

APPEAL by the defendant from a judgment entered upon the report of a referee in favor of the plaintiff. The facts of the case fully appear in the opinion of the court.

R. A. Watkinson, for the appellant.

Charles H. Smith, for the respondent.

By the Court, HILTON, J.—The defendant hired of the plaintiff two lodging rooms, in the hotel known as the Smithsonian House, for the period of six months, at the stipulated price of six dollars per week. The rooms were heated by steam pipes, and were furnished with gas, the use of which was permitted without extra charge. After occupying the rooms eight weeks, and paying for the time occupied, the defendant left, and gave notice to the plaintiff "that he would not occupy them any more." It appeared on the trial before the referee that the rooms were kept vacant for the defendant for the remainder of the period for which they were hired, and that the defendant might at any time have taken possession of, and used them. Upon this state of facts, the referee reported in favor of the plaintiff for the amount claimed, being the whole contract price for the use of the rooms for the residue of the term for which they were hired. No evidence was offered on the part of the defendant; and it did not appear that the plaintiff had an opportunity to rent the rooms during the period they were kept vacant, or that he might have rented them had any effort been made to do so.

From the decision of the referee the defendant has appealed, and insists that the plaintiff has shown no damage except such as resulted from his own act in keeping the rooms vacant; and in the absence of any proof of inability to rent the rooms after the defendant abandoned them, the plaintiff was not entitled to recover anything, and the referee erred in not giving judgment for the defendant.

To sustain this view the defendant relies upon the decision in *Wilson* v. *Martin*, (1 Denio, 602), which was an action brought upon a parol agreement, made on the 18th April, 1839, with the plaintiff, who was a boardinghouse keeper, for rooms and board for the defendant and his family, for one year from the first of May following. After occupying from the 1st of May to the 17th of June, the defendant became dissatisfied with the board, and quit

the house. The plaintiff claimed to recover the stipulated price for the use of the rooms, with board, for the residue of the year; and for which, at the trial, a verdict was rendered. On the trial, and upon the appeal subsequently taken by the defendant, he claimed that the contract was void, within the statute of frauds, for not being in writing. The judge who tried the cause decided that it was not void, and so instructed the jury; but the Supreme Court, upon the appeal, held otherwise; and the judgment was reversed upon that ground alone, and that is all the court there determined.

In delivering the opinion of the court, BRONSON, J., remarks "that the plaintiff was not entitled, as a matter of course, to recover the stipulated price for the use of the rooms to the end of the year. He could not refuse the rooms to other lodgers, leaving them idle, and then recover against the defendant as for use and occupation." And although the decision of the court was not put upon this ground, yet I see no reason for disagreeing with the views thus expressed by that learned judge, in a case where it appears by the evidence that the plaintiff has so conducted. But if he meant to say, as the defendant here claims, that the plaintiff, to be entitled to recover at all in an action of this nature, is bound to show affirmatively that he could not rent the rooms to other parties during the period the defendant refused to occupy them; then, with the greatest respect for the opinions of that learned judge, I feel constrained to differ from him.

A party who enters into a valid contract, and refuses to perform it, is chargeable with such damages as naturally result from the breach; and, as a general rule, in an action like the present, to recover such damages, it is only necessary for the plaintiff to show affirmatively the nature of the contract, his readiness to perform it at all times during its continuance, and the breach on the part of the defendant. It is very true, as stated by Judge BRONSON, in another part of the same opinion, that "a party has no right to conduct himself in such a manner as to make the damages unnecessarily burdensome where he seeks to recover such damages from one who is chargeable with a breach of con-

tract;" and I may add that his recovery should in all cases be limited to such damages as appear necessarily to have resulted from the breach. And where it is shown that he has realized, or might have obtained, from the use of the rooms by others, in the manner which the defendant contracted to use them, any moneys which might be applied in extinguishment of the defendant's liability, his damages should be lessened to that extent. *Ashburner* v. *Balcher*, 3 Seld. 262. But the burden of showing such to have been the case rests upon the defendant; if any facts of this kind existed they are of an affirmative character, and if the defendant desires the benefit of them, he should have proven them. He is the party who has done the wrong—who has violated his contract; and as between him and the plaintiff, all presumptions of good faith and fair conduct should be in favor of the latter. *Starr* v. *Peck*, 1 Hill, 273.

Upon the general principle that the burden of proving a fact rests upon him who asserts it, and who is to be benefitted by it when shown, and for the other reasons I have stated, I am of opinion that the plaintiff showed, on the trial, sufficient to entitle him to recover; and if the defendant relied upon the alleged fact that the plaintiff purposely kept the rooms vacant when he might have rented them, in mitigation or extinguishment of the damages arising from his breach of contract, it was his duty to prove it. *Costigan* v. *Mohawk & Hudson RR. Co.*, 2 Denio, 608.

The referee decided correctly, and the judgment entered upon his report should be affirmed.

Judgment affirmed.

Norman Kendall *v.* Milton N. Grey.

In an action by a physician to recover for medical services, it is competent for him to prove the nature of the disease and the character of treatment given, in order to fix the value of the services rendered.

Such evidence is not rendered incompetent by the provisions of 2 Rev. Stat. 406,

§ 73, forbidding the disclosure of confidential communications made by a patient to his physician.

Those provisions only relate to communications or information acquired by a person, duly authorized to practice physic, while attending a patient in his professional capacity, and which were necessary to enable him to prescribe.

They do not extend to communications made to a person in attendance at the office of the physician in his absence, and which are not shown to have been made as the basis of a prescription.

APPEAL from a judgment of the Third District Court. The action was brought to recover for goods sold and delivered; the plaintiff's bill of particulars therefor amounting to $98.75. The answer denied the allegations of the complaint, alleged payment of the plaintiff's claim, and averred that plaintiff was indebted to defendant for medicines sold, and for medical services rendered, and demanded judgment for a balance claimed. The bill of particulars of defendant's claim amounted to $58.50.

On the trial, after the plaintiff had proved the sale and delivery alleged, a witness named Page was called for the defendant, who testified that he was connected with Dr. Grey, (the defendant), in his office. Was not his partner, but had the privilege of his office in consideration of answering for him when he was absent. Had no interest in his fees or business. He knew of plaintiff coming to Dr. Grey's office for medical treatment. Heard him say he came for an operation. The plaintiff's counsel objected to the witness being allowed to state anything which would tend to disclose the nature of plaintiff's disease, because the communication by him to the witness was of a confidential character, made to him as a physician, and as connected with defendant in his office. The justice sustained the objection, and excluded every question tending to show the nature of the disease for which the plaintiff was treated.

On the part of defendant, it was further made to appear that the plaintiff had formerly rendered a bill for that which he now claimed to recover, charging only $26.75. See *Williams* v. *Glenny*, 16 N. Y. R. 389.

The justice rendered judgment in favor of plaintiff for $20.25. The defendant appealed.

F. Upton Fenno, for the appellant.

W. C. Carpenter, for the respondent.

By the Court, DALY, First Judge.—This judgment must be reversed. The bill rendered to the defendant, by the plaintiff, was given in evidence, and the plaintiff admitted that it was the only bill he had rendered. This bill showed that the amount of the plaintiff's claim, as fixed by himself, was but $26.75, though he claimed, by his bill of particulars, for the same items, $98.75. By the ruling of the justice, which was altogether erroneous, the defendant was cut off from showing the nature of the disease for which he had treated the plaintiff, a knowledge of which was essential to estimate properly the full value of the service which the defendant had rendered. Communications made to a physician while attending in a professional capacity, do not, by the general rules of evidence, come within the class of privileged communications, (*Dutchess of Kingston's case*, 11 Har. 243; 1 Greenl. § 248); and our statute, (2 R. S. 406, § 73), being in derogation of the general rule of law, cannot be extended beyond its express term. It applies only to cases of communications and information, acquired by a person duly authorized to practice physic, while attending a patient in his professional capacity, and which communications or information were necessary to enable him to prescribe for the patient. The witness Page stood in no such relation to the plaintiff, nor was it shown or offered to be shown that the statement made by the plaintiff to Page was for the purpose of enabling Page to prescribe for him, or was stated to Page to enable Grey to prescribe for him. Even the plaintiff, who having offered himself as a witness, and who could claim no such exemption, as the inquiry related directly to the matter in issue, was exempted by the ruling of the court from stating anything respecting the nature of the disease, while he testified that he had paid Dr. Grey $4, and supposed that that was all that he charged. Without inquiring as to the nature of the proof of the value of the picture, or whether there was any evidence

of its delivery to the defendant after it was repaired, as it was of little or no value before, it is sufficient for the reversal of the judgment that the defendant was precluded from showing the nature of the disease for which he had treated the plaintiff, and had performed an operation upon him, and which may have been very material to enable the defendant to show the true value of his services. The defendant's bill was $58.50, and, allowing the defendant $50 for the picture, which is all he claimed in his bill of particulars, and taking the other items at the amount fixed by himself in the bill he rendered to the defendant, his claim would amount to $76.75 at its utmost limit, from which is to be deducted $6.50, paid by Grey, reducing it to $70.25. Now, Grey's bill, $58.50, deducted from this, would leave the balance in favor of the plaintiff $11.75, and he had judgment for $20.25. It is plain, therefore, that the justice did not allow Grey the full amount of his claim, and as he would not allow him to give evidence which, upon the mere inspection of Grey's bill, it is evident was essential to prove the nature of the service he rendered and the value of it, the judgment cannot be sustained.

Judgment reversed.

THOMAS GILLEN *v.* JOHN L. HUBBARD, IMPLEADED WITH GARRET VAN CLEVE AND GEORGE RYERSON.

Where a building contract specifies a sum to be deducted for any particular omission or failure in its performance by the contractor, the owner cannot, in a proceeding by a sub-contractor to enforce a lien acquired under the Mechanics' Lien Law, claim any other or greater rate of deduction by reason of the omissions, for the purpose of showing himself discharged from liability to the contractor.

Where the contract provides that if, during the progress of the work, the contractor fails to supply a sufficiency of workmen or materials, the owner may provide them after three days' notice, and deduct the expense from the contract price; the owner, if he elects to exercise this power, and under it finishes the

building, cannot afterwards claim any greater deduction or allowance from the contractor than the amount expended or incurred in completing the work agreed on.

The contract having further required the certificate of the architect to entitle the contractor to any of the several payments specified in it, *Held*,

I. That when the owner, under the clause previously mentioned, undertook the completion of the building, he became the contractor *pro hac vice*, and the certificate was thereby rendered unnecessary.

II. That the recovery in such a case would be the sum remaining unpaid upon the contract; after deducting the amount expended in completing the work, and the sums stipulated in the contract for any failures or omissions.

APPEAL from a judgment entered upon the report of a referee. The action was brought by a sub-contractor to enforce a mechanic's lien on a building erected in the city of New York.

The defendant, John L. Hubbard, was owner of the building in question, he having contracted with the defendants, Van Cleve and Ryerson, for the erection of it. The plaintiff was employed by Van Cleve and Ryerson to furnish materials for and build the stairs in the house, which he did, and thereby became entitled to receive from them $199. For this amount he filed a notice of lien.

The contract for the erection of the building required Van Cleve and Ryerson to furnish all the carpenter's work, agreeably to certain drawings and specifications made by the architect, and complete the same on or before April 1st, 1855, in a good, substantial and workmanlike manner, to the satisfaction and under the direction of the architect, to be testified by a writing or certificate under his hand. The payments were to be made in certain sums, proportioned to the progress of the building, and it was provided "that in each of the said cases a certificate be obtained and signed by the said architect."

The contract also contained the following clauses:

"*Second.*—The contractor, at his own proper cost and charges, is to provide all manner of materials and labor, scaffolding, implements, moulds, models, and cartage of every description, for the due performance of the several erections. *Third.*—Should the owner, at any time during the progress of the said building,

request any alteration, deviation, additions, or omissions from the said contract, the same shall be made, and shall in no way affect or make void the contract, but will be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation. *Fourth.*—Should the contractor, at any time during the progress of the said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen, after three days' notice in writing being given to finish the said works, and the expense will be deducted from the amount of the contract. *Fifth.*—Should any dispute arise respecting the true construction or meaning of the drawings or specification, the same shall be decided by the architect, S. A. Warner, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of the extra work or works omitted, the same shall be valued by two competent persons; one employed by the owner, and the other by the contractor; and those two shall have power to name an umpire, whose decision shall be binding on all parties. *Sixth.*—The owner shall not in any manner be answerable or accountable for any loss or damage, that shall or may happen to the said works, or any part or parts thereof respectively, or of any of the materials or other things used and employed in finishing and completing the same, loss or damage by fire excepted. If one cedar closet is omitted, the sum of one hundred dollars is to be deducted from the amount of this contract. If the painting is omitted, the further sum of four hundred dollars is to be deducted from the amount of this contract."

The performance of the required work was entered upon, but not proceeding satisfactorily, or being finished within the time agreed on, the defendant Hubbard, the owner, gave the notice referred to in the *fourth* clause of the contract, and thereupon proceeded to, and did complete the building; and the question in the case presented, was, whether anything was due upon the contract to which the lien would attach, after deducting the amount expended in completing the work, the value of any omissions or failures in its performance, and any damages which the owner

was legally entitled to, and shown to have resulted from its non-performance.

The action was referred, and the referee reported that at the time of filing the notice of lien, there was due on the contract from the owner, the sum of $199, and for that sum judgment was given. The defendant Hubbard, the owner, appealed, and the facts other than those stated, and which seem material to the question presented, are given in the opinion of the court.

Man & Rodman, for the appellant.

I. The plaintiff was bound to show that at the time of filing the lien, something was due, or that subsequently something became due, on the contract, by the owner to the contractors, which they could have recovered in an action against the owner. *Spalding* v. *King*, 1 E. D. Smith, 717; *Dixon* v. *La Farge*, id. 722. The last payment (the only one in question,) never became due, for these reasons, viz: It was payable when all the work was furnished, according to the plans and specifications, and provided the architect's certificate be obtained, and the work done to the architect's satisfaction, expressed in writing. (*a.*) The contractors never finished their work in any manner; but stopped before it was done. They could not recover on the contract, because they had not performed it. The right to the last payment depended on the completion of the whole job. *Paige* v. *Ott*, 5 Denio, 406; *Champlin* v. *Rowley*, 18 Wend. 187; *Cunningham* v. *Jones*, 3 E. D. Smith, 650; *White* v. *Hewitt*, 1 id. 325. In order to sustain this judgment, the referee should have found that the contract was performed by the contractors. On the contrary, he finds that it was not performed. (*b.*) The payments were all conditioned upon the performance of the work to the architect's satisfaction, expressed by his certificate. That was a condition precedent to the payment. *Smith* v. *Driggs*, 3 Denio, 73; *Adams* v. *Mayor, &c.*, 4 Duer, 308.

II. The referee finds that the house was worth $2,000 a year. By the contract, the carpenter work was to be completed by the 1st April, 1855. It was not finished until about 1st January,

1856. Hubbard has a just claim for damages against the contractors for the loss of rent, which, at that rate, is about $1,500. This was a just and valid set-off against any claim of the contractors. It was a right of action which could not be discharged or waived by parol, even if there was any evidence of such a discharge or waiver, which there is not. *Allaire* v. *Whitney*, 1 Hill, 484; affirmed, 1 Com. 305; *McKnight* v. *Dunlap*, 1 Seld. 337. Besides, this is a proceeding in which any legal or equitable defence may be set up by the owner against the contractor. *Owens* v. *Dickerson*, 1 E. D. Smith, 691. The question is, what is due on the contract? Any claim for loss of rent, or delay, may be proved under that issue. *Gourdier* v. *Thorp*, 1 E. D. Smith, 697.

III. Van Cleve & Ryerson could not recover on a *quantum meruit*, but only on the contract, by proving performance. 5 Denio, 406; 18 Wend. 187; *Smith* v. *Brady*, 17 Smith's N. Y. Rep. 173.

In England the rule is different. Here, both the rule of law and the provision of the lien law require that, in order to the plaintiff's recovery, money must be due on the contract, so that the contractor could recover it in an action on the contract against the owner. The referee also erred in disregarding the agreement to submit all questions as to extras or omissions to arbitration or to the architect. *Smith* v. *Brady*, (*sup.*,) HARRIS, J.; *Butler* v. *Tucker*, 24 Wend. 447.

Beebe, Dean & Donohue, for the respondent.

I. The report of a referee, like the verdict of a jury, is conclusive where there is no decisive preponderance of evidence against its conclusions. *Eaton* v. *Benton*, 2 Hill, 576; *Easterly* v. *Cole*, 1 Barb. 235; *Green* v. *Brown*, 3 Barb. 119; *Quackenbush* v. *Ehle*, 5 Barb. 469.

II. The conclusion of a referee on conflicting evidence will not be set aside. *Spencer* v. *Utica and Schenectady Railroad Co.*, 5 Barb. 337.

III. The questions in this case were purely questions of fact, and are fully sustained by the evidence.

IV. The only questions were, whether Van Cleve & Ryerson had entered into the contract with the plaintiff set out in his complaint, and whether, at the time of filing the notice of his claim, there was anything due from Hubbard to Van Cleve & Ryerson; and the referee having passed upon these questions, and his findings not being against the weight of evidence, the report should not be set aside.

V. The contract provided that if the contractor neglect to complete the work after three days' notice, in writing the owner might do so, and the expense should be deducted from the amount of the contract. This leaves the contract in existence, and provides the penalty to be suffered by the contractor. The contractor could, therefore, recover on the contract, less the amount which may have been paid by the owner to finish. The referee allowed the owner for all the expense he was put to in finishing the building.

By the Court, BRADY, J.—The defendant agreed that if the contractor should, at any time during the progress of the work to be done under the contract, refuse or neglect to supply a sufficiency of materials or workmen, that he should have the power to provide the materials and workmen after "three days' notice in writing being given to finish the work," and that the expense would be deducted from the amount of the contract. And the defendant, acting upon this part of the contract, and after the alleged abandonment of the work by the contractors, notified them that they were required to supply the requisite materials and workmen for the completion of the contract, and that in default thereof he would supply the same, and deduct the expense thereof from the contract price. The penalty for a failure or refusal to supply materials and workmen appears to have been determined by the contract, and to have been understood and acted upon by the defendant. If the contract had been silent upon the subject, there would be no difficulty in relieving the defendant from any of his alleged grievances, because, the contractors having failed to perform their contract, the plaintiff, as

a lienor, could not recover. *Neville* v. *Frost*, 2 E. D. Smith, 62; *Cunningham* v. *Jones*, 3 E. D. Smith, 650; *Smith* v. *Brady*, 17 New York Rep. 172.

It seems, from the testimony in this case, that the principal omissions of the contractors were the painting, and the construction of one cedar closet; and by the terms of the contract the penalty for such omissions was regulated. If one cedar closet was omitted, the sum of one hundred dollars was to be deducted from the amount of the contract; and if the painting was omitted, the sum of four hundred dollars was to be deducted in like manner. It may be said, with propriety, in reference to this part of the contract, that it gave to the contractors, if they thought proper so to do, the right to omit one cedar closet and the painting, and thus qualified the engagement to finish the building according to the plans and specifications of which these things were a part. But whether that be so or not, the defendant cannot claim for those items more than he has agreed to accept, and cannot ask more than a reduction of the amounts agreed upon for these omissions. In determining the obligation of the contractors, the whole contract must be considered; and thus considered, it is an agreement to erect and furnish all the carpenter's work of a dwelling house on or before the 1st of April following its date, with a proviso that if the contractors should refuse or neglect to supply a sufficiency of materials or workmen, the defendant should have the power, on a notice of three days, to finish the work and deduct the expense from the amount of the contract. And with a further proviso, that if one closet were omitted, and the painting omitted, a deduction of five hundred dollars could be made by the defendant in the manner before stated. These features of the agreement gave the defendant the means of preventing any unnecessary delay in the performance of the work contemplated, and the power of substituting himself for the contractors upon the happening of the contingencies expressed. Doubtless he might have disregarded the power thus conferred, and have rested upon his right to have the work performed at the time agreed upon; but he did not adopt that

course, and, having acted upon the contract, must abide by the consequences. The omission of the contractors to furnish the certificate of the architect, required by the contract, is answered by the fact that the defendant undertook to finish the work for the contractors, who, not having done it, were not entitled to the certificate. The contractors would not be entitled to the certificate if the painting was omitted, although the deduction for such omission agreed upon was a qualification of the contract as to the parties themselves. It was not so as to the architect. His certificate depended upon the contractors' performance. The ninth payment was to be made when the work was completely finished according to the plan and specifications, provided the certificate of the architect was obtained. When the defendant undertook to do the work, as already mentioned, the architect's certificate was not only unnecessary in fact, but as a matter of form. The relation of the parties was changed, and the defendant became the contractor *pro hæc vice*. This view of the case disposes of the objections made to the right to recover, and leaves to be considered the state of the accounts between the contractors and the defendant. The contractors were entitled to the sum of $950, and $76 for extra work, making, in all, $1,026. The defendant was entitled to $500 for the omission of one cedar closet and the painting, $160.56 for glass put in, and $58 for the cost of completing tin roof and a difference in the skylight, making, in all, $718.56, which, deducted from $1,026, would leave a balance of $307.44 due to the contractors. The defendant, however, insists that he is also entitled to a deduction of at least $416 for rent of the premises from the 13th October to 1st January, 1856, when the premises were finished. This claim is based upon the agreement of the contractors to finish their work on the 1st April and the value of the house per annum, estimated at $2,000 as a rental.

The referee finds that the rent of the house was $2,000 per annum, but does not find that the defendant sustained any damages by reason of the contractors' failure to finish the premises on 1st April. Indeed there is no finding on that subject. The de-

fendant did not set up such damages in his answer, although he gave proof of the rental without objection; yet, so far as the referee's report is concerned, the parties have treated the matter as of little importance. The defendant has only excepted to that part of the referee's report whereby he finds, as conclusions of fact, that the defendant was indebted to the contractors in the sum of $200, and that the plaintiff has acquired a lien for the sum of $199. The exceptions are to conclusions of law, and not to the findings of fact; and the defendant has failed to present the case in such manner that we can reverse the judgment on the ground suggested; and, as the referee has allowed the defendant all his expenses, the judgment will be affirmed.

Judgment affirmed.

WILLIAM KAIN *v.* JOSEPH HOXIE AND OTHERS.

In an action to recover rent reserved in a lease, against a party in possession of demised premises, a *prima facie* right to recover is established by showing him to have been in actual possession at the time the rent became due.

In such a case the presumption of law is, that he occupied as assignee of the original lessee.

This presumption may, however, be rebutted, and the party exonerated from liability to the lessor, by showing that he was not assignee in fact, and had no interest in the lease, but occupied by permission of the lessee as under-tenant or otherwise.

And where it appears that the party thus in possession did not possess the entire estate of the original lessee in the term demised, no recovery can be had.

The liability of an assignee of a lease rests upon his estate, and when a party in possession of demised premises shows that no estate is vested in him, it follows that he is not liable as assignee.

APPEAL from a judgment rendered at special term upon trial by the court without a jury. The complaint alleged that one Graves took from plaintiff a lease of certain premises in New York city; that in August, 1857, Graves sold the stock, fixtures, steam engine, &c., used by him upon the premises, to one Bald-

win; that Baldwin entered into possession of the premises; that Baldwin shortly afterwards sold the stock, fixtures, and steam engine to defendants, who entered into possession of the premises, and continued in occupation thereof until November 1, 1857. The complaint claimed that defendants were, by operation of law, assignees of the lease, and were liable to plaintiff for the quarter's rent due November 1, 1857.

On the trial, after the plaintiff had proved the execution of the lease to Graves, as set out in the complaint, Baldwin was called as a witness. He testified that in September, 1857, Graves was in failing circumstances; that to secure witness, who was indorser for him, Graves turned out to him the stock, fixtures, and machinery employed by him in carrying on his box making establishment, upon the premises demised by the lease. Witness took the property to secure himself, without intending to carry on the business. He ordered the men to go on making boxes, until he could dispose of the property. On October 1, 1857, he sold the stock, fixtures, &c., to defendants, and gave them possession. Witness did not hire the premises from Graves, nor was the lease or any interest in the lease assigned to him; nor did he assign any lease, or any interest in any lease, to defendants.

The defendants testified that no assignment of the lease, or of any interest in it, was ever made to them. They had offered to pay *pro rata* for the time they were in occupation of the premises; which was refused.

It appeared that, after the sale by Graves to Baldwin, Graves made a general assignment for the benefit of creditors to one Howell Hoppock.

The following facts were found by the judge, before whom the cause was, by consent, tried without a jury, as established by the evidence at the trial:

First. Graves hired of plaintiff the premises under the lease set out in the complaint. *Second.* On the 4th day of September, 1857, Graves being then in possession, turned out to D. A. Baldwin, a steam engine and fixtures, used in box manufacturing, then on the premises, mentioned in said lease to secure him for

certain indorsements, and gave him possession of the said property. *Third.* Graves, on the 5th day of September, 1857, made and delivered to Howell Hoppock, the assignee therein named, a general assignment of all his property, and the said assignee thereupon accepted the same, and the trusts therein mentioned, but declared that he would not take the leases, because there was no money in them. *Fourth.* Baldwin manufactured on the premises till October, 1857, when he sold to the defendants the stock and fixtures. *Fifth.* The defendants entered on the premises and manufactured till the 1st of November, 1857. *Sixth.* Baldwin offered to pay plaintiff one month's rent, and the defendant Hoxie offered to pay to the plaintiff for the use of the premises from the time he, the said defendant, acquired any interest in the steam engine and fixtures, at the same time denying his liability to pay the plaintiff any rent for the premises. *Seventh.* No assignment of the lease, or of any interest, or of any term therein, was ever made to Baldwin, or to the defendants, or either of them.

And as a conclusion of law, upon the facts so found, the judge held that the defendants were not liable to the plaintiff for the rent claimed.

Upon exceptions interposed to this conclusion, and from the judgment entered thereon, the plaintiff appealed.

Augustus W. Clason, for the appellant.

I. Baldwin came upon the premises by the sufferance or permission of the lessee. As to the landlord, he was in the place of Graves. 5 Cow. 129; 8 Wend. 175. The defendants entered through Baldwin. An entry, immediate or remote, through a tenant, is an entry in subordination to the lease. 2 Wend. 489; 2 Sand. 597; 4 Sand. 369; 12 Barb. 253; 18 Barb. 608.

II. An entry in subordination to a subsisting lease, and possession when rent accrues, charges the possessor as an assignee by operation of law. He can only be discharged by proving a condition incompatible with that relation. 9 Cow. 88. The reason is obvious. An entry is by right or by wrong.

III. The possessor is an assignee in fact, an assignee by opera-

tion of law, a subtenant or a trespasser. The law which presumes right, infers a tenancy, fixes his legal relation to the landlord, and concludes him by his possession, unless he show the true state of his title. 12 Wend. 555; 4 Hill, 113. It is no answer to this conclusion that he is not, and that another is, assignee in fact. Such answer does not explain the possession, nor state a right. This rule of law is not harsh; for he who occupies the land of another, must have some right for his occupation.

IV. Nor does such an answer meet the rule, for there is a privity of estate, as well as a privity of contract. 12 Wend. 555 was an action upon privity of contract, and the issue was upon privity of contract. That issue, the court properly held, was not sustainable by proving privity of estate.

V. This action is upon privity of estate. If the defence can be sustained, then a liability, arising from privity of estate, can always be defeated by showing want of privity of contract. Hoppock was not assignee in fact. As general assignee he refused to take the lease, as he had a right to do. 12 Barb. 253. Indeed, after the sale of the engine, and delivery of possession of the premises to Baldwin, it is doubtful if the general assignee could have entered into possession.

Nathaniel B. Hoxie, for the respondents.

I. No assignment of the lease, or of any interest, or of any term therein, having been at any time made to the defendants, or either of them, no cause of action whatever exists against them. This is a conclusion of fact found by the judge, and no other conclusion could have been arrived at upon the testimony. Taylor on Land. & Ten. (2 ed.) § 450; *Williams* v. *Woodward*, 2 Wend. 487; *Quackenboss* v. *Clark*, 12 Wend. 555.

II. The matters stated in the complaint, if proven, uncontradicted and unexplained, would amount to no more than a presumption of law, that there was an assignment of the lease or term. *Prima facie* evidence merely of an assignment. The rule is simply one of evidence. Cases *supra*.

III. This presumption, if sufficiently created, was overcome

and destroyed, and this *prima facie* evidence rebutted and contradicted by the most abundant testimony. Not only was it proven that no such assignment was ever made to or accepted by the defendants, but it was proven that an assignment of the lease in question was made to and accepted by Hoppock long before the alleged occupation of the defendants. *Durando* v. *Wyman*, 2 Sandf. S. C. R. 597. (*a.*) The vague suggestion that Hoppock would not take the leases, in no degree affects the assignment and acceptance, and cannot vary the legal effect thereof; and, moreover, was made casually to Baldwin alone after the execution of the assignment and acceptance. *Mead* v. *Phillips*, 1 Sandf. Ch. R. 85.

IV. There is no principle of law that estops these defendants to deny any assignment to them of this lease or term. Not one of the elements of an estoppel exists in the case. Neither the offer of Baldwin, nor of the defendant Hoxie, qualified as they were, can avail the plaintiff for any purpose. They were purely gratuitous.

V. There is neither privity of contract, nor of estate, between the plaintiff and the defendants, and the judgment should be affirmed.

By the Court, HILTON, J.—In June, 1856, the plaintiff leased to one Graves the premises No. 365 Greenwich street, in this city, for the term of 21 months from the first of August following, at the yearly rent of $500, payable quarterly. On September 4, 1857, Graves, being then in possession under the lease, sold to one Baldwin the machinery and fixtures upon the premises, and on the next day executed and delivered to Howell Hoppock a general assignment of all his property for the benefit of his creditors. After the sale, Baldwin went upon the premises, and used the machinery until about the 1st of October thereafter, when he sold it to the defendants, who also continued its use in the same manner until the 1st of November following, on which day a quarter's rent became due. This was demanded of the defendants, and payment being refused, the plaintiff brought

this action to recover it from them as assignees of the lease. The defendants denied being such assignees, and set up that the lease passed under the assignment to Hoppock.

A trial was had before Judge BRADY, without a jury, who found, in addition to the facts stated, "that no assignment of the lease, or of any interest therein, or of any term therein, was ever made to Baldwin or to the defendants, or either of them." Judgment was given for the defendants. No exception was taken to the finding of the judge, and upon this appeal by the plaintiff we are only called upon to determine whether, on the facts stated, the defendants are liable.

In actions like this the rule of law is well settled, that the plaintiff establishes *prima facie* his right to recover by showing that the defendant was in possession of the premises at the time the rent became due, and the presumption of law then attaches that he was in as assignee of the original lessee. *Armstrong* v. *Wheeler*, 9 Cowen, 88; *Williams* v. *Woodward*, 2 Wend. 487; *Provost* v. *Calder*, 2 Wend. 518.

But this presumption may be rebutted by the defendant showing the real nature of his occupation. He may prove that he is not assignee, or that he is under tenant, or occupying by permission of the lessee, or has some lesser estate, or no estate or interest whatever in the lease, and thus exonerate himself from liability for rent to the original lessor. 2 Phillipps on Evid. (7 London ed.,) 151; *Holford* v. *Hatch*, 1 Doug. 183; Taylor's Land. & Ten. (1st ed.) 221; *Durando* v. *Wyman*, 2 Sand. S. C. 597; *Quackenboss* v. *Clarke*, 12 Wend. 555. And unless it appears, presumptively or otherwise, that the defendant possesses the entire estate of the original lessee in the term demised, no recovery can be had. *Holford* v. *Hatch*, *supra*.

Here it was conclusively shown by the evidence at the trial, and so found by the judge, that the defendants never had any interest whatever in the lease; and it would seem the most that could be said of them is, that they occupied the premises for the period of one month without objection from any one. This may, and probably did, make them liable for such use and occu-

pation to the lessee, or his assignee; but it created neither privity of contract nor estate between them and the plaintiff. Their having so occupied did not estop them from denying that they were assignees, and showing the nature of their possession. But were it otherwise, which, however, I do not concede, it would be enough to say that the evidence upon this point was admitted at the trial without objection, and it is now too late to raise any such question.

In the language of Ch. J. SAVAGE, in *Quackenboss* v. *Clarke*, (*supra*): "The liability of the *assignee* rests upon his *estate*, and it is clear that when it is shown that no estate is vested in the defendant, it follows that he is not liable as assignee."

Judgment affirmed.

BENJAMIN CLAPP *v.* ROSWELL GRAVES.

HENRY B. CLAPP *v.* THE SAME.

A judgment of affirmance having been given upon an appeal, the appellant made application at the next term after judgment was entered, for an order granting leave to appeal to the Court of Appeals. Both parties were heard on the application, but the court did not announce its decision granting the motion, until the term had passed. *Held*, that the order allowing the appeal was properly directed to be entered, as of the term when the application was made.

It is a general rule, that when an act, in which the concurrence of the court is necessary, should be done within a specified time, and the party has done all he is required to do, he is not to suffer from the court's delay.

If, in such a case, the court renders its decision after the time has passed, it may be entered as of the time when by law it ought to have been given.

APPEAL from an order made at special term. The actions were commenced in the Marine Court. The plaintiffs had judgment in both, and the defendant appealed to this court, where the judgments were affirmed. The defendant then applied, under section 11 of the Code, for leave to appeal to the Court of Appeals. The application was made and argued at the September term, 1858, that being the next term after that at which the judg-

ments of affirmance were rendered: but the application was held under advisement by the court for some time, so that their decision granting the motion (which is reported, *ante* 245,) was not announced until the December term.

The court allowed the order granting the appeal to be entered as of September term, so as to bring the case within the requirement of the statute, that the leave must be granted before the end of the term next after that at which the judgment was rendered.

The plaintiff subsequently moved at special term to vacate the order or modify it, to correspond with the date at which it was actually made. The special term denied the motion, and the plaintiffs appealed from the decision and the order made thereon.

Harrington & Grieff, for the plaintiffs.

John Winslow, for the defendants.

By the Court, DALY, First Judge.—To authorize an appeal to the Court of Appeals, it is necessary by the statute that the general term should, by order duly entered, allow such appeal before the end of the next term after which judgment is entered. The appellant applied for such an order at the next term, both parties were heard, but the court did not announce its decision until the term was passed; but they directed the order allowing the appeal to be entered up as of the term when the application was made, that being the next term after judgment.

It is a general rule, that when an act is to be done within a certain time, in which the concurrence of the court is necessary, and a party has done all that he is required to do to obtain the decision of the court, that he is not to suffer through the court's delay; and if the court give their decision after the term is passed, it may be entered up as of the time when by law it ought to have been given. "It is by no means universal," says Lord Kenyon, in *Pearson* v. *Rowling*, (1 East. 405), to make entries of judicial acts *nunc pro tunc*, and the reason is given in *Crispe* v. *The Mayor*

of Berwick, (Vent. 90), "there being no default in the party, but a delay which came by the act of the court." So in *Craven* v. *Hawley* (Barnes, 255,) it is said, *per curiam*, "the party must not suffer by the court's taking time to consider." In *Lure* v. *Rich*, (10 Mod. 30), a writ of inquiry was executed, and before entry of judgment, which was delayed by the act of the court, the plaintiff died, and it was held that the court having delayed the entry of judgment, it should be entered up as of the proper term; and in *Lord Mohun's Case* (6 Mod. 59,) a rule for the reversal of an attainder was obtained upon the consent of the attorney, served in the reign of James II.; and long after, in the reign of Anne, the court directed the clerk to make the entry, which should have been made when the rule was obtained, declaring that they would supply the neglect or defect of their officers, that subjects should not suffer by it, and to the same general effect are numerous authorities. *Taylor* v. *Matthews*, 10 Mod. 325; *Turks* v. *Duke of Beaufort*, 1 Burr. 146; *Mayor of Norwich* v. *Berry*, 4 id. 2277; *Astley* v. *Reynolds*, 1 Str. 915; *Webb* v. *Spunel*, Barnes, 261; *Toulmin* v. *Anderson*, 1 Taunton, 385; *Mackay* v. *Rhinelander*, 1 Johns. C. 408; *Blewitt* v. *Tregoning*, 4 A. & C. 1002; 1 Leon, 187; Latch, 92; 1 Sid. 462; 1 Williams on Executors, 763; Tidd's Practice, 932, 9th Lond. ed.

The motion below, therefore, was without foundation, the order allowing the appeal having been correctly entered by the order of the court as of the September term.

Order appealed from affirmed.

CLARKSON UNDERHILL *v.* ALPHEUS REINOR AND OTHERS.

Where a constable or party seeks to justify the taking of personal property, by virtue of an execution issued upon a judgment, the judgment record and execution must be produced, and a levy shown under it.

The existence of the judgment and execution cannot be proven by parol.

Where the parties to an execution accompany the constable to the house of the defendant, and, while the constable pretends to sell only "the right, title and

interest of the defendants in property on the premises not belonging to him, they countenance and assist purchasers acting in concert with them, in the removal of the property as upon an absolute sale: *Held*, that all are liable to the owner for the value of the property thus disposed of and removed.

APPEAL by plaintiffs from a judgment of the District Court for the first district. The action was brought to recover damages for the conversion of certain chattels, household furniture, &c., by the defendants Alpheus Reinor, Claus Reinor, Robert Reid and others.

On the trial before the justice the plaintiff proved a chattel mortgage upon the furniture in question, made by Mrs. Susan S. Hildreth, the former owner of the property, to secure the payment of two notes, one of which was payable on demand, and the other fell due on July 1, 1857. This mortgage was duly filed. The notes referred to in the mortgage were given partly for cash lent and partly for milk sold by the plaintiff to Mrs. Hildreth. At the time of the conversion alleged, both notes were overdue and unpaid.

The defendants justified on the ground that the property in question was sold by Reid as a constable, upon an execution issued at the suit of the Reinors against Mrs. Hildreth. It appeared, however, by the testimony of Mrs. Hildreth, that the sale relied on took place about February 1, 1858, long after the notes referred to in the mortgage were overdue and unpaid. She testified that it was commenced by defendants during her absence from her residence, where the furniture was. She came home, however, before the sale was over. A portion of the goods had been removed by purchasers when she arrived, others had not. She was never served with any summons in the action in which the alleged execution was issued. She did not remember ever having seen the execution. She had certainly never seen the defendant Reid, the constable, with an execution at her house.

The defendant Reid testified that he was a constable; that he called on Mrs. Hildreth, and exhibited to her the execution in the suit of the Reinors against her. The plaintiff's counsel

objected to this statement on the ground that no execution had been proved, but the objection was overruled. The witness further stated that he asked Mrs. Hildreth for payment of the execution, which she could not make. He then told her he should go on and sell. She notified him of the plaintiff's mortgage. He then apprised the Reinors, the plaintiffs in the execution, that he should require a bond before he would sell. They gave him a bond, and directed him to go on and sell, which he did,—proceeding to the sale with a horse and cart for the purpose, evidently, of removing the property, and accompanied by the plaintiffs in the execution, who assisted in its removal. On the sale the constable announced that he sold only the right, title and interest of Mrs. Hildreth, but it was manifest that this was intended to evade liability, by artifice, as the purchasers appeared to act in concert with the constable and the plaintiffs, being aided and assisted by them in removing the property from the house as soon as it was struck off. Neither the judgment in favor of the Reinors against Mrs. Hildreth, nor the execution issued upon it, were given in evidence by defendant.

On these facts the justice gave judgment for defendants, and the plaintiff appealed.

Palmer & McAdam, for the appellant.

James Parker, for the respondents.

By the Court, HILTON, J.—This action was brought to recover the value of certain household furniture, claimed to belong to the plaintiff, wrongfully taken from him by the defendants, and by them converted to their use. On the trial it appeared that the plaintiff's ownership was derived under a chattel mortgage of the property, executed to him by Susan S. Hildreth, dated June 20, 1857, and duly filed in the register's office. That the debt which the mortgage was given to secure was due and unpaid, and the property, at the time when it was so taken by the defendants, was in the possession of the mortgagor at a boarding house kept by her in Bleecker street in this city. The

defendants showed no title to the property, and in no way justified the taking, notwithstanding which the justice gave judgment in their favor.

It would seem, however, from the evidence on their part, that they claimed to act under an execution against the mortgagor; but no judgment, execution or levy was shown, and the mortgagor testified that she never was served with a summons in the suit, and that she never saw the execution. That on her returning home, about the first of February last, she found the defendant J. R. Reid, who appears to be a constable, selling her furniture; and the other defendants, it is shown, (except one of the Reinors), were present, either assisting in or urging on the sale, or removing the property.

Although there was no direct proof of the fact, yet it seems that the Reinors were the plaintiffs named in the execution under which Reid claimed to act, and who, as he states, gave him a bond of indemnity to "*go and sell.*"

Upon such evidence the defendants were all to be deemed trespassers and equally liable, and on what ground the justice gave judgment in their favor it is difficult to perceive. He likewise erred in permitting the defendants to prove the existence of the execution by parol, and in allowing the notice of sale, under which the constable claims to have acted, to be put in evidence. If the defendants desired to impeach the plaintiff's mortgage, or his title derived under it, it was necessary for them to show some right in themselves. To do so they should have produced the judgment and execution, and shown a levy and sale under it. *Parker* v. *Walrod*, 16 Wend. 514; *Earl* v. *Camp*, id. 562; *Posson* v. *Brown*, 11 John. 166. This was not done, and the exception of the plaintiff to the admission of this proof was well taken, and the evidence should have been rejected. 1 Cowen's Tr. 328, (3d ed.); *Yates* v. *St. John*, 12 Wend. 74.

In conclusion, I may add that it is quite evident that the defendants intended to evade responsibility, by Reid, the constable, pretending to sell "only the right, title and interest of the mortgagor" in the furniture, while the other defendants, as pur-

chasers or abettors in the sale, removed the goods, or countenanced others in their removal. But the trick thus attempted is too transparent, and will not screen them; and the claim based upon it should not have had any weight with the justice.

The evidence clearly shows an intent of the parties to take and sell the property. The Reinors indemnified the constable Reid to sell it, who took with him a horse and cart for the purpose of removing it; and Brown was a purchaser at the sale, and took or removed part of the property, with a full knowledge of the trick intended.

That individuals should connive at and plan such proceedings is matter for surprise and regret, but when a public officer not only aids and assists, but acts as principal in attempting such an outrage upon the rights of individuals, he deserves our unqualified condemnation.

The finding of the justice was clearly erroneous, and the judgment should be reversed.

Judgment reversed.

MARY KOENIG *v.* HIRAM NOTT.

A complaint in an action by a female alleged "that the defendant, with force and arms, ill treated and made an assault upon her, and then and there debauched and carnally knew her." *Held*, upon demurrer, a sufficient averment of an assault and battery.

A female upon whom a rape has been committed may maintain an action for the injury sustained. The right of action is not merged in the felony.

In actions brought in this court, it is not necessary to show affirmatively by the complaint, that the court has jurisdiction of the person of the defendant, or of the subject matter of the action. If such an objection exists it must be presented by demurrer or answer.

Per HILTON, J., dissenting.—In the absence of the material averment in the complaint, that the plaintiff was ravished without her consent, the action should be considered as having been brought for seduction: and which cannot be maintained by the party seduced.

The general rule in the construction of a pleading—that a party has stated his case

in the best way which it is capable of being stated—has not been altered by the Code.

The Code, by requiring pleadings to be liberally construed, does not mean that substantial averments may be omitted, and the omission disregarded.

APPEAL from an order made at special term, overruling a demurrer to the complaint. The complaint alleged "that on the 1st day of September, 1857, at the city of New York, the plaintiff was employed as a servant in the family of the defendant; that on the said date, at said city, the defendant, with force and arms, ill treated and made an indecent assault upon her, the said plaintiff, and then and there debauched and carnally knew her, the said plaintiff, whereby she (the said plaintiff) became pregnant and sick with child, and so remained and continued for the space of nine months then next following—at the expiration of which time, on the 24th day of May, 1858, she, the said plaintiff, was delivered of a child of which she was pregnant as aforesaid; that in consequence of said indecent assault made by the defendant on the plaintiff, she has suffered greatly in her health, and became sick and disordered, and so continued for the space of six months, during all which time she suffered great pain, and was prevented from transacting her necessary business and affairs, and has been greatly disturbed in her peace of mind, and has been otherwise greatly injured to her damage of one thousand dollars."

The defendant demurred on the following grounds: *First*, That this court has no jurisdiction of the person of the defendant or the subject of the action, as stated in the complaint. *Second*, That the complaint does not state facts sufficient to constitute a cause of action.

Judgment having been ordered for the defendant on the demurrer, the plaintiff appealed.

Charles Waters, for the appellant.

I. This complaint is not for a seduction or loss of services, but for an indecent assault and battery, made on the plaintiff by the defendant, of which it is "a concise and simple statement,"

as required by the Code of Procedure, § 142, subdivision 2, page 159.

II. The right of action of any person injured by any felony, shall not in any case be merged in such felony, or in any manner affected thereby. 2 Rev. Stat. (4th ed.) 563; see also Sedgwick on Damages, 497, and note and authorities there cited.

III. "Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other." Code, § 7, p. 19; see also *Boardman* v. *Gore*, 15 Mass. Rep. 336; *Bolen* v. *Alexander*, 6 Humph. Rep. 433; *Blessingame* v. *Glover*, 6 B. More, 33; *Foster* v. *Commonwealth*, 8 Watts & Serg. 77; *Cross* v. *Guthrie*, 2 Root (Conn.) 90.

Wessel S. Smith, for the respondent.

I. The complaint does not contain facts sufficient to constitute a cause of action; because, 1. The gist of the action, as stated in the complaint, is the debauching the plaintiff and getting her with child. The allegations of ill treatment and indecent assault are mere inducement to the main charge. *Shufelt* v. *Rowley*, 4 Cow. 58; *Moran* v. *Dawes*, id. 412; *Dain* v. *Wyckoff*, 3 Seld. 191. 2. This action can only be maintained by a parent, master, guardian, or one standing in *loco parentis*, for loss of service, and then, in order to maintain the action, it must be shown that there was the actual or constructive relation of master and servant, and the master must show that he has the right to the services of the female debauched. 3 Stephen's N. P. (ed. 1844) 2352 and cases; *Bartley* v. *Ritchmeyer*, 4 Com. 38, 43, 48, and cases. 3. But the seduced cannot support the action in her own name. Same cases; *Cowden* v. *Wright*, 24 Wend. 429, 430; *Whitney* v. *Hitchcock*, 4 Den. 461–463.

II. As to the alleged indecent assault, the plaintiff cannot maintain this action; because, 1. The complaint does not show that even a technical assault was committed. 2. It does appear, however, that the alleged assault was committed with the plaintiff's consent, and for the consequences of which she was *in pari delicto*, and therefore cannot maintain this action.

III. Did the allegations in the complaint as to the battery constitute a charge of rape, which is a felony? And were the allegations sufficient to charge a felony that will carry it to the criminal courts, and it would not be sustained? 2 Sedgw. & P. 1 Ed. and cases. *Hyde* v. *Sawyer*, Paterson, 39. 2 Hall cases.

IV. The complaint is fatally defective in not stating facts to show that this court has acquired jurisdiction over the person of the plaintiff or the subject matter of the action: because, 1. The jurisdiction of this court is limited to the cases mentioned in the statute creating the court. They have jurisdiction only in civil cases, and all facts necessary to give jurisdiction must be averred in the complaint. Code Procedure, ed. 1855, § 9, p. 21: § 22, p. 42: *Wells* v. *Wright*, 1 Sell. 497, 511, and cases: *Foss* v. *Ford*, 2 N. 176, and cases: see also, in connection, *Gay* v. *Stewart*, 4 J. R. 262; *Dakin* v. *Hudson*, 6 Cow. 221; *Cortland* v. *Rogers*, 6 Wend. 495; *Lawton* v. *Erwin*, 9 id. 233; *People* v. *Keeler*, 7 Hill, 39, and cases: *Grover* v. *Gould*, 20 Wend. 227. 2. The complaint is, therefore, fatally defective, in not averring that the plaintiff was a resident of, or personally served with the summons within the city and county of New York, or within the jurisdiction of this court. 3. This objection is properly and sufficiently raised by the demurrer, and is not waived by the defendant appearing and taking the objection. Code, §§ 144, 147, 146; *Belden* v. *N. Y. & H. RR. Co.*, 15 Pr. R. 17, and cases; *Wilson* v. *The Mayor, &c.*, id. 500.

V. The grounds of demurrer are sufficiently stated. Code, § 141, and cases, (ed. 1855).

DALY, First Judge.—The averment in the complaint is not of an assault merely, but of a battery also. The plaintiff avers that the defendant *with force and arms* made an *assault* upon her, and *then* and *there* debauched and carnally knew her. As every battery includes an assault, it is the usage in pleading to aver both, as is done here. (2 Chitty Pl. 851, 6th Am. ed.) The ground of action in this complaint is the debauching and carnally know-

ing the plaintiff, which is averred to have been done by force. The *vi et armis* clause is not limited to the averment of an assault, but is connected by the copulative with what follows, and relates equally to the debauching and carnally knowing That this is an averment of an assault and battery, does not, in my opinion, admit of a doubt. A battery, which, as before suggested, always includes an assault, and the statement of which in pleading is always accompanied by an averment of an assault, is any unlawful touching of the person of another, the degree of violence being immaterial; nor is it essential that the act should have been willfully done, as it will suffice if the facts relied upon show either that the defendant was in fault, or that the act was unlawful; (see cases collected in 2 Greenleaf's Ev. §§ 84, 85; 1 Saund. Pl. & Ev. 141, 5th Am. ed.); and certainly the averment here, that the defendant by force debauched and carnally knew the plaintiff, is a battery within this definition.

The doubt in respect to this complaint has arisen, I apprehend, from the pleaders employing the form of averment, "assaulted, debauched and carnally knew," which was usual in actions of trespass *vi et armis*, brought by a father for the seduction of his daughter, or by a husband for a criminal conversation with his wife. Thus, in *Woodward* v. *Walton*, (1 Bos. & Pul. N. S. 477), which was an action of trespass, the averment was, that the defendant, with force and arms, assaulted, debauched and carnally knew the plaintiff's daughter; and in *Rigaut* v. *Gallisard* (7 Mod. 80,) the court say, "if a man find another man in bed with his wife, he may have an assault and battery against him." Thus, in the forms in Chitty, for action of trespass *vi et armis* for criminal conversation or seducing a daughter, the averment is always, assaulted, debauched and carnally knew, (2 Chitty's Pl. 856, 6th Am. ed.), and to the same effect are numerous authorities. *Macfudzen* v. *Olivant*, 6 East. 387; *Bennett* v. *Olcott*, 2 T. R. 166; Bac. Abr., Marriage, E. 2. Although in such actions the injury is to the relative rights of the father or husband, yet as he is not supposed to assent to the act, it is regarded as done forcibly as against him, and for damages sustained by him *per quod*,

servitium amisit, or *per quod consortium amisit*, trespass *vi et armis*, was considered a proper form of action.

Lord HOLT is reported to have said, in *Russell* v. *Corne*, (2 Ld. Ray. 1032; 1 Salk. 119), that a man could not maintain an action against another, for assaulting his daughter and getting her with child, unless there had been an unlawful entry into the plaintiff's premises, in which case the assault upon the daughter would be an aggravation; but the accuracy of Lord Raymond's recollection of what was said by HOLT, was doubted in *Woodward* v. *Walton*, (*supra*), and the law was held to be otherwise, upon the authority of an earlier case than the one in Raymond, (*Guy* v. *Liversey*, Cro. Jac. 501; 2 Roll. R. 51), which was an action of assault and battery, in which the plaintiff recovered for a battery inflicted by the defendant upon him, and also for the loss of the service and companionship of his wife, who went with the defendant and lived with him in a suspicious manner; and *Cholmley's Case*, cited in the foregoing, where a man brought an action for the battery of his wife, and recovered for the injury to him thereby. A man might, therefore, bring trespass *vi et armis* for the seduction of his wife, daughter or servant, or for an assault and battery upon them, and hence the averment of assaulted, debauched and carnally knew, in all the forms—for whether the carnal knowledge was with or against the will of the wife or daughter, the action was equally maintainable. No forms appear in a case like the one now before us, because for seduction the women had no cause of action, (*Hamilton* v. *Lomax*, 26 Barb. 615), and if a carnal knowledge of her person was obtained against her will, it was a rape, and the civil action was merged in the felony. Our statute has changed the law in this respect, (3 R. S. 589, 5th ed.), and a woman, upon whom a rape has been committed, may maintain an action for the personal injury, and in stating her cause of action, it is sufficient if her complaint conforms to what was essential in the way of averment in actions of trespass for injuries to the person.

The averment of the plaintiff here is that the defendant made an indecent assault upon her, and then and there debauched and

carnally knew her. It has been shown, from the cases cited that upon the averment, assaulted, debauched and carnally knew, a father or husband might bring an action for the injury done to him by an assault and battery upon the person of his wife or daughter; and if that form of averment would be sufficient in an action by him for the injury done to his relative right, it would be equally so in an action by the daughter for the direct injury done to her. It is an averment of an injury to the person, unlawfully inflicted, by force, and sufficiently describes the act that caused the injury whoever brings the action.

The demurrer in this case was interposed and sustained by the judge at the special term, upon the assumption that the words, made an indecent assault, and then and there debauched and carnally knew, imported nothing more than the seduction of the plaintiff, for which she could maintain no action. I have already pointed out the mistake that the party demurring has fallen into, as I suppose, from finding these words exclusively used heretofore in actions for seducing a daughter or a wife, and inferring thereby that they amounted to nothing more than an averment of seduction. And I also apprehend that he has not entirely comprehended the full extent of the meaning of the word "debauched," which the plaintiff has used as descriptive of the act or injury done to her, and which, in our ordinary dictionaries, is defined "enticed, led astray, vitiated or corrupted;" but which, especially when used as a legal word, has a more extended signification. The verb "to debauch" is a word of French origin, compounded of the preposition "*de*," *from*, and "*bauche*," an old Armorican word in use in Brittany, meaning *shop*, and signifying, in its compound sense, to entice or draw one away from his work, employment, or duty. *Lunier, Dictionairie des Sciences et des Arts, Paris*, 1805. It is in this sense of enticing and corrupting that it came into use in our language, as will be found by a reference to one of the earliest authorities for the meaning of English words, (Phillips' New World of Words, 1696,) where it is defined "to corrupt one's manners, to make lewd, to mar or spoil;" a sense in which it had been previously used by Ben

Jonson and by Shakspeare. Bailey, in his Dictionary, some twenty years after, adds further, "to seduce and vitiate a woman." As applied to a woman, the word, as thus defined, meant merely seduction. But in the folio edition of Bailey (by Scott, 1755), the meaning of the word was extended "to seduce and *violate* a woman." It is in this twofold sense that it is used in the law forms, and which it has now fully acquired as a general word. McKenzie, in his English Synonyms, (London, 1854), defines it to "ravish, deflower, violate;" and it is used in Worcester's Dictionary (Boston, 1847), as an appropriate definition for the word "constuprate," from the Latin *constupro*, meaning to violate. There is authority, therefore, in the legal forms and in the lexicographers, for the use of the word in the sense in which the plaintiff has employed it. But the complaint would be good even without this word. The words assaulted, and then and there carnally knew, are sufficient. In *Tullidge* v. *Wade*, (3 Wils. 18), which was an action of trespass, the averment was simply that the defendant, with force and arms, made an assault upon the plaintiff's daughter, and got her with child. Here there was nothing imputing seduction—no word capable of that signification—yet the sufficiency of the averment to sustain an action of trespass was not questioned; a case in respect to which Sir James Mansfield remarked, in *Woodward* v. *Walton*, (*supra*), that there was no doubt that "every objection would have been made to the form of the declaration which could avail the defendant." For these reasons, I think the demurrer to the complaint was not well taken.

BRADY, J.—The complaint in this case is, in form, the statement of a rape committed upon the plaintiff by the defendant, and one of the questions presented by the appeal is, whether for such violence the party aggrieved can maintain an action to recover damages. In England, the civil right to sue for injuries occasioned by a felony was not merged or destroyed, but suspended until conviction or acquittal. It is there said to be the duty of the party injured to bring the offender to justice, or to

make some effort thereto, and that until that duty is performed, he cannot maintain an action. 2 Black. Com. (Book 4, page) ed. 1836, note 8. Blackstone, in the text, places the doctrine upon the ground that, "as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor." The rule will also be found stated in Sedgwick on Damages, page 471, (2d ed.), with a reference to cases, showing that it has not prevailed in this country. It does not now prevail in this state, and I have not been successful in finding any case in which it was ever enforced. The statute is express on the subject. The right of action of any person injured by any felony shall not, in any case, be merged in such felony, *or be in any manner affected thereby.* 2 Rev. Stat. 563, (6th ed.)

This statute has removed any impediments that may have existed by the common law, and, therefore, for the assault and battery committed by the defendant, the plaintiff has a right of action which may be enforced, and on the trial of which she could prove, in aggravation of damages, the consequences of that assault. The gist of the action, however, is force and violence. If the plaintiff consented to the debauchery she cannot recover, and it should appear by the complaint that such was not the case. The Code requires a plain and concise statement of the facts constituting the cause of action, and provides that the sufficiency of a pleading shall be determined by the rules therein prescribed. Sections 140, 141. The plaintiff, in the statement of the violence committed by the defendant, charges that the defendant, "with force and arms ill treated, and an indecent assault made upon her, and then and there debauched and carnally knew her, whereby she became," &c. Under the former system of pleading, when it was material to rely upon actual force, as in the case of a forcible entry, the words *manu forti*, or "with strong hand," should be adopted; but in other cases *vi et armis*, "or with force and arms," were sufficient. 1 Chitty's Pl. 143, (6th Am. ed.) And in actions of assault and

battery, the declaration charged that the defendant, on a certain day and place, assaulted the plaintiff, and then proceeded to state the grievance according to the facts. See 2 Chitty's Pl., (ed. *supra*,) pages 848, 849. The complaint herein, in adopting the phraseology of the old forms, has departed from the rules which the legislature has established; but the facts embraced in the complaint, though improperly stated according to the existing provisions, are, nevertheless, sufficient to constitute a cause of action. If the defendant, with force, ill treated the plaintiff, and made an indecent assault upon her, and with force debauched her, upon the conclusions herein expressed a cause of action exists, and though to the form of stating it there may be an objection, that objection is not the subject of demurrer. Code, § 144. The remedy, if any, is by motion to make the complaint more definite and certain. Code, § 160.

The remaining question is embraced in the proposition, that the complaint is fatally defective in not stating that this court has acquired jurisdiction over the person of the plaintiff, or the subject matter of the action, and this objection is predicated of the fact that it does not appear that the defendant was a resident of, or personally served with process within the city and county of New York, or within the jurisdiction of this court. The answer to this proposition is simple. The defendant may demur to the complaint when it shall appear upon the face thereof that the court has no jurisdiction of the defendant, or the subject of the action. Code, § 144. And when that does not appear upon the face of the complaint, the objection may be taken by answer. Code, § 147. It does not appear, upon the face of the complaint, either that the court has no jurisdiction of the defendant, or of the subject matter of the action, and therefore the cause of demurrer does not exist. If the court, in fact, has no such jurisdiction, the defendant must set it up by answer, and his demurrer upon that ground fails.

I think the judgment of the special term should be reversed.

HILTON, J., (dissenting).—The complaint alleges that on Sep-

tember 1, 1857, at New York city, the plaintiff was employed as a servant in the defendant's family, and on that day the defendant, "with force and arms," ill treated and an indecent assault made upon her, and then and there debauched and carnally knew her, whereby she became pregnant and sick with child, and so remained for nine months thereafter, at the expiration of which time she was delivered of the child. That in consequence of such indecent assault she has suffered greatly in her health, became sick and disordered, and so continued for six months, suffering great pain; was prevented from attending to her business, and has been greatly disturbed in her peace of mind, and otherwise greatly injured, to her damage $1,000, for which judgment is demanded.

The defendant demurs upon two grounds: 1st. That this court has no jurisdiction of the person of the defendant, or the subject of the action. 2d. That the complaint does not state facts sufficient to constitute a cause of action.

For the reasons stated by Judge BRADY, I am of opinion that the first ground of demurrer is untenable; but I do not concur with him in his conclusion that the complaint states facts sufficient to constitute a cause of action.

It is a general rule, in the construction of a pleading, that the court must assume that the party has stated his case in the best way in which it is capable of being stated, and this rule has not been altered by the Code, (sec. 159), which requires pleadings to be liberally construed, with a view to substantial justice between the parties. Liberally, as here used, means that if, from the whole pleading, it can be seen that a party has a cause of action or defence, he shall not be deprived of it because he has stated it in an improper or informal manner; but it does not mean that substantial averments may be omitted, and the omission disregarded.

It is claimed by the plaintiff that the complaint shows, as a cause of action, an *indecent assault and battery* committed by the defendant on her, whereby she was injured and sustained damage. An action of this nature is so easily stated—rests upon

such simple facts—that there should be no difficulty in determining whether the allegations in the complaint are such as, liberally construed, show that such a cause of action really exists.

To my mind, the complaint does not show such a cause of action. It does not, in terms, allege that a rape was committed upon her, and a felony of such a nature should not be presumed in the absence of the *material averment*, that the intercourse was a *ravishment*, to which she in nowise consented. Nor can we infer from it that the defendant committed an assault *and battery* upon her, as the legal signification of the language used is, that he threatened her without touching her person, and it is not stated that by the threatening she was in any degree put in bodily fear.

Upon the most liberal construction of the complaint, this should, in my opinion, be considered as an action brought for debauching and seducing the plaintiff, and as it is conceded that an action of such a nature cannot be maintained by the party seduced, (*Barclay* v. *Richmeyer*, 4 Comst. 48; *Whitney* v. *Hitchcock*, 4 Denio, 461), I am of opinion that the order appealed from sustaining the demurrer should be affirmed.

Order appealed from reversed.

Francis Wood v. Norman Kelly.

Where a party has, in good faith, taken an appeal from a judgment of the Marine or a district court, and through mistake has omitted to conform his proceedings to the requirements of the Code, this court may permit such amendments to be supplied as will make the appeal effectual.

The authority to do this is distinctly given by the Code, and extends even to permitting the notice of appeal to be amended, by inserting in it the grounds of appeal.

The various provisions of law respecting amendments of proceedings upon appeals from inferior courts, reviewed and explained.

The case of *The People* v. *Eldridge* (7 Howard P. R. 108) disapproved.

The former jurisdiction of the Superior Court, on appeals from the Marine and justices' courts, having passed to this court, all its powers as an appellate tribunal passed with such transfer of jurisdiction.

This court possesses all the powers and jurisdiction of county courts throughout the state.

APPEAL from an order of the special term, upon a motion to dismiss an appeal from a district court. The plaintiff having recovered a judgment in the First District Court against the defendant, the latter appealed to the general term of this court. The undertaking for costs filed by him was, however, drawn in the form usual in appeals from the special to the general term of the Supreme Court, and was not drawn in compliance with section 354 of the Code. The plaintiff moved to dismiss the appeal on the ground of this defect in the security. The judge at special term granted the motion, with $10 costs, unless the appellant within five days filed and served an undertaking in the form required by statute on appeals from the district courts, and pay the costs of the motion. The defendant, within the time prescribed, filed the proper undertaking and paid the costs. The plaintiff appealed from the order, contending that the court had no power to allow the filing of a new bond, and that an order dismissing the appeal absolutely should have been made.

J. W. Culver, for the appellant.

Wakeman & Latting, for respondent.

By the Court, DALY, First Judge.—Of the power of this court to allow an amendment, or to allow something to be supplied which has been omitted by mistake, where a party has, in good faith, given notice of appeal from a judgment of the Marine or district courts, so as to conform the proceeding to the requirements of the Code, we have never entertained any doubt. We have even allowed the notice to be amended by inserting the grounds of appeal. See case referred to in *Irwin* v. *Moore*, (13 How. 410), decided at the general term, in July, 1856. The authority to do so, on such terms as may be just, is distinctly conferred in the general provisions respecting appeals (§ 327,) where the party has, in good faith, given notice of appeal, but omitted through mistake to do some other act necessary to perfect the appeal.

When the declaratory provision in section 8, to which our attention is called, was enacted in 1848, the Superior Court of this city was the appellate tribunal of the Marine and district courts, (Code of 1848, § 302), and hence the name of that court was inserted in that portion of the section relating to appeals to the courts there enumerated, as contradistinguished from actions in the courts previously enumerated; and the name of the Superior Court still remains in that part of the section, though it has no longer any appellate power in such cases, the jurisdiction it then exercised having been conferred exclusively upon this court by the amendment of the Code in 1849, (Code of 1849, § 351), and all the powers which it exercised in 1848, as such appellate tribunal, necessarily passed to this court with the transfer of jurisdiction. The 8th section declared that the second part of the Code should relate to appeals to the Court of Appeals, the Supreme Court, the county courts and the Superior Court of this city, and consequently the general provisions respecting appeals applied to all these courts, except so far as they were modified or limited by the chapter relating to each court specifically. This jurisdiction of the Superior Court upon appeals from the Marine and district courts, having been transferred to this court, all the provisions of the Code relating to such appeals, applied thereafter to this court as well as all new enactments relating to such appeals. In the following year, 1849, the general provisions respecting appeals (Chapter I of Title XI,) were materially altered, and among the new provisions was the one before referred to, authorizing the court to allow an amendment where notice of appeal was given in good faith, but some act omitted through mistake, which was necessary to perfect the appeal, and which we have always construed as applying to appeals from the Marine and district courts to this court. During the ten years that this court has had cognizance of these appeals, all its judges have been uniformly of the opinion that the provisions of the chapter entitled "Appeals in General," so far as they were applicable, applied to this class of appeals, as well as to any other. The decision of Judge BARCULO, (*People* v. *Eldridge*, 7 How. 108), to which we

are referred, was a special term decision. It has been frequently called to our attention, but has never been approved or followed by any member of the court, and it was fully considered when the decision previously referred to, in July, 1856, was rendered at general term.

The amendment of 1858, which declares that the appeal shall be ineffectual unless the prescribed undertaking is executed within the time limited, is not in its general scope and object any more stringent than the previous provision, which declared that the prescribed undertaking required by § 334 must be executed, "to render an appeal effectual for any purpose," and yet under that provision, and before the provision was enacted declaring that the court might amend where notice of appeal was given in good faith (§ 327,) it was held in *Wilson* v. *Allen*, (3 How. 368), that the Supreme Court might amend a defective undertaking, given upon appeal with the consent of the sureties, so as to make it conformable to the Code. There is nothing in the amendment of 1858 indicating any intention to restrict or limit the power of the court to amend, as provided for in § 327, and under that section the power to allow a new undertaking to be filed is ample.

The respondent having accepted the $10 costs, imposed by the judge below, as a condition on permitting the amendment, it may be doubted whether he could thereafter appeal from the order. He certainly could not have both the $10 costs and a reversal of the order, but the appeal having been disposed of upon its merits, the decision of this point becomes unnecessary.

The order below must be affirmed.

HILTON, J.—To the reasons above assigned, I add, that this court possesses all the powers and jurisdiction now possessed by the county courts throughout the state, and as there can be no doubt that they have the power to permit an amendment to an undertaking on an appeal to them, it follows that a like power is vested in us. (See Laws 1854, ch. 198, § 6.)

Order appealed from affirmed, with costs.

WRIGHT AND JAMES W. GILLIES *v.* JOSEPH CRAWFORD.

The provisions of the Two Thirds Act (3 R. S., 5 ed., 93, sec. 7,) which require the petition of the insolvent to the judge, to be accompanied by the affidavit of each petitioning creditor, stating the nature of his demand, with the general ground and consideration of such indebtedness, is not complied with by an affidavit merely stating a sum to be justly due from the insolvent for two promissory notes, given for an amount specified.

And where the affidavit of one of the petitioning creditors, whose demand was necessary to be included to make up the required two thirds in amount of all the debts owing by the insolvent, gave no other statement of indebtedness; *held*, that the judge to whom the petition was presented acquired no jurisdiction to proceed under the act, and the discharge granted by him was void.

It seems, that if the insolvent, in his petition, or the petitioning creditor fails to set forth the consideration of the indebtedness, the omission, in either case, is subject to the same rule of law; and the judge to whom the petition may be presented will acquire no jurisdiction to proceed under the act referred to.

APPEAL from a judgment of the District Court for the sixth district. The defendant set up, as a defence to the action, a discharge under the Two Thirds Act; the justice held the defence established, and gave judgment in his favor. The plaintiff appealed. The grounds of objection to the discharge are fully stated in the opinion. It should, perhaps, be mentioned, in addition to the facts there stated, that it appeared by the proceedings to obtain the discharge, that the defendant's whole indebtedness was over $40,000, and there were petitioning creditors to the amount of $28,000. The notes held by William Crawford, who was one of those petitioning, amounted to $4,500; so that, excluding his claim, the two thirds in amount of the creditors did not join in the defendant's petition.

Luther R. Marsh and Stephen B. Brague, for the appellant.

I. The discharge is void, because William Crawford, one of the petitioning creditors, did not specify what his claim was for, but merely said that he held two notes. "The affidavit of the petitioning creditor shall state (among other things) the nature

of the demand, and whether arising on any written security or otherwise, with the general ground and consideration of such indebtedness." 2 R. S., p. 199, § 7; *Matter of Cook*, 15 J. R. 183; *Dupuy* v. *Swart*, 3 Wend. 135, 344. A specification that a debt is due on a promissory note, without setting forth the consideration thereof, is insufficient. *Slidell* v. *Crea*, 1 Wend. 156.

II. Crawford's whole indebtedness amounted to over $40,000, about $28,000 petitioned; deduct $4,500, the two notes held by William Crawford, and it will leave only $23,500 as petitioning —not two thirds of his indebtedness.

III. The affidavit of the publication of the notice to creditors in a New York paper, should have been made by some one connected with the paper. 2 R. S., p. 648, § 69.

IV. The affidavit of service of notices on creditors, should have been sworn to before the officer who granted the discharge. *Stanton* v. *Ellis*, 16 Barb. 319; 2 Abbott, 178; 2 Kernan, 577.

C. Patterson, for the respondent.

By the Court, BRADY, J.—The defendant pleaded and proved a discharge from his debts, granted by the Hon. MURRAY HOFFMAN, one of the justices of the Superior Court of this city, on his application, accompanied by that of his creditors. The plaintiffs then produced, proved and put in evidence the papers on file in the office of the clerk of this county relative to the discharge, and interposed several objections affecting the validity of the discharge. One of these objections was that the affidavit of William Crawford, one of the petitioning creditors, did not state the nature of the demand, with the general ground and consideration of the indebtedness. The objection is fatal. The affidavit of Crawford states that the sum annexed to his name is justly due to him from the insolvent, for two promissory notes, one of $2,000, and one of $2,550.91. The statute requires the petitioner to annex to, and deliver with his petition, a full and true account of all his creditors; and, among other things, the true cause and consideration of his indebtedness in each case, and

the place where such indebtedness accrued. 2 R. S. 200, § 8, (4th edition.) And by the 7th section of the same statute it is provided that every such petition shall be accompanied by an affidavit of each petitioning creditor, which shall state, among other things, "the nature of the demand, and whether arising on any written security, or otherwise, with the general ground and consideration of such indebtedness." The affidavit of Crawford does not conform to this provision, and Justice HOFFMAN never acquired jurisdiction. Something more should be stated than that the debt was due on a note,—Per SAVAGE, Ch. J. *Slidell* v. *McCrea*, 1 Wendell, 156. See also *In the matter of Cook*, 15 John. Rep. 183; *McNair* v. *Gilbert*, 3 Wendell, 344; *Stanton* v. *Ellis*, 2 Kernan, 575.

The statute requires, as we have seen, that the petitioner and petitioning creditor should set forth the consideration of the indebtedness; and the omission in either case is subject to the same rule of law. It may be said, perhaps, and with much propriety, that greater strictness should be required of the creditor in the statement referred to, to prevent frauds that might otherwise be consummated. It is not necessary, however, to assign any reasons to show the utility of this view. It is enough that the statute has declared that a thing must be done which has not been done, and the judgment must be reversed.

Judgment reversed.

MICHAEL H. AND DANIEL CASHMAN *v.* AARON H. BEAN.

In an action for goods sold and delivered at a specified date, the defendant appeared, but before trial paid the demand sued for, and thereupon the suit was discontinued. Subsequently the plaintiff brought an action against him upon a demand of the same general nature, existing at the time the first suit was commenced. *Held*,

I. That there was no recovery in the first action, which, in any case, would be a bar to another suit.

II. The demands, having arisen out of separate sales, at different dates, and upon specified credits, constituted independent causes of action.

To constitute a "recovery" which would be available, by way of defence, as a bar to another action for the same cause, it should be obtained by the judgment of a court or other competent tribunal.

APPEAL by defendant from a judgment of the District Court for the sixth district. The action was brought to recover for a quarter cask of brandy, sold by the plaintiffs to the defendant on August 26, 1857, on a credit of six months. There had been a prior sale of brandy by the plaintiffs to defendant, to recover for which plaintiffs had brought a former suit. That suit was, however, not commenced until after the expiration of the credit given on the sale embraced in this action. The defendant paid the amount claimed, and now pleaded the former suit and payment, in defence to this action. The justice rendered judgment for the plaintiffs, and defendant appealed. Other details are given in the opinion.

Burrill, Davison & Burrill, for the appellant.

Thomas E. Stewart, for the respondents.

By the Court, HILTON, J.—The defendant, on this appeal, asks the application of the familiar rule of law, that a party who sues and recovers for a portion of an entire demand, shall be barred of the residue; and, as the case has been rested upon this single proposition, it is only necessary to show its inapplicability here, to determine the appeal taken.

1st. It appears that no judgment whatever was rendered in the action first brought, the alleged recovery in which is set up in the answer as a bar to the present suit. The evidence shows that an action was commenced to recover the price of a quantity of brandy sold and delivered at a specified time, that the defendant appeared, but before trial paid the amount claimed, and thereupon the suit was discontinued. This was not a "*recovery*" which, in any case, would be available as a bar to another suit. No money was obtained by the judgment of a court, and

payment of the amount claimed under such circumstances simply went towards extinguishing so much of the plaintiff's demand.

2d. The two suits related to separate demands or transactions. Each arose out of a sale of a distinct quantity of brandy upon a specified credit of six months, expiring at different periods. In the language of STRONG, J., in *Secor* v. *Sturges*, 16 N. Y. Rep. (2 Smith,) 548, "a plainer case of distinct, independent causes of action, could hardly be presented."

Judgment affirmed.

JOHN G. GOTTSBERGER *v.* JOHN RADWAY.

Where a guaranty of the payment of rent, to grow due upon a lease, is expressed to be "in consideration of the letting," it will be intended, for the purpose of giving a consideration to the guarantee, if nothing to the contrary is shown, that the landlord agreed to let, in consideration of the promise of the surety; and this, notwithstanding the guaranty bears date after the lease.

After the execution of a lease by the lessee, and of a written guaranty of the payment of rent by a surety, the lessee called on the lessor, and objected to taking possession of the demised premises, on the ground of their defective state of repair. The lessor thereupon promised to make the repairs required.

Held, that this promise was wholly without consideration, and the breach thereof by the lessor formed no defence to an action against the surety upon his guaranty.

APPEAL by defendant from a judgment of the District Court for the second district. The action was brought against the defendant as surety for one John B. Curtis, for the rent of premises hired by Curtis from the plaintiff. The grounds of the defence to the action are fully stated in the opinion of the court.

George M. Rea, for the appellant.

Charles E. Shea, for the respondent.

By the Court, DALY, First Judge.—By an agreement in writing,

entered into January 21, 1858, between the plaintiff Gottsberger and one Curtis, Gottsberger agreed to let, and Curtis agreed to take certain premises for a specified period at a stipulated rent, and on the 28th of January following, the defendant Radway, in consideration of the above letting, agreed in writing with Gottsberger, to pay the rent or any arrears thereof that might remain due, or any damages that might arise from the non-performance of the covenants in the agreement between Gottsberger and Curtis. The making of these agreements was admitted by the pleadings, and to the first objection taken, that the agreement of the defendant is without consideration, it is enough to say, that the consideration sufficiently appears upon the face of it. That it bears date after the agreement to let, makes no difference. It sets forth that that letting is the consideration for the promise made by the defendant, and it will be intended, though the agreement of the surety bears date afterwards, if nothing to the contrary is shown, that the plaintiff agreed to let in consideration of the promise of the defendant afterwards put in writing.

Upon the trial the defendant called a witness, who testified that he was present at an interview between Gottsberger and Curtis, on the 2d or 3d of February, in which Curtis told Gottsberger, that he and the witness were to occupy the premises together. The witness then stated that the understanding between him and Curtis was, that Curtis objected to taking the premises, upon the ground that they were not in a state to be comfortable—that they required some repairs. After testifying to this understanding between him and Curtis, which was wholly irrelevant, the witness further testified that at the interview, Gottsberger said he would make the repairs and have them done by the 6th of February, and that Curtis objected to taking possession unless repairs were made. That the witness went to the premises on the 8th of February, and the repairs had not been made, and that Curtis called on Gottsberger and said he would not take the premises upon that ground.

This promise of Gottsberger, to make repairs, was wholly without consideration. Curtis had already made a contract to

take the premises for a certain period, at a specified rent, and the defendant had become surety for the punctual payment of that rent. That agreement, which was in writing, and which was executed by both Curtis and Gottsberger, contained no covenant or undertaking on the part of Gottsberger to make any repairs, and if repairs were necessary, Curtis would have to make them himself, the landlord being under no obligation by his agreement to make any. *Munford* v. *Brown*, 6 Cow. 475; *Pomfret* v. *Rycroft*, 1 Saund. R. 320. In the language of SAVAGE, C. J., in the first of these cases, "the tenant takes the premises for better and for worse," and if the premises needed repair, or to use the language of the witness, were not in a state to be comfortable, Curtis should have exacted an agreement to repair, before he bound himself to take the premises. Curtis and Gottsberger having entered into a valid and binding contract by which the rights and obligations of the respective parties were expressed and fixed, it was necessary that some new consideration should exist, to support a promise by Gottsberger to make repairs, or constitute an agreement which would take the place, change, or alter the conditions of the one already existing.

The question whether Curtis had hired other premises, was wholly immaterial, and was properly ruled out by the justice.

Judgment affirmed.

LOUIS ALTHOF, ADMINISTRATOR, AND JANE C. WARNER, ADMINISTRATRIX, OF WILLIAM H. WARNER, DECEASED, *v.* NATHANIEL H. WOLF.

In an action under the statutes of 1847 and 1849, by the representatives of a person killed by the wrongful act, &c., of another, to recover damages for his death, the jury should not, in assessing the damages, allow any deduction because of the fact that his wife had received the amount of an insurance effected upon his life for her benefit.

Where defendant directed his servant to remove snow and ice from the roof of his house, giving no specific instructions as to the manner of doing it, and the servant

procured another to assist him; the ice was so negligently thrown from the roof as to kill a person passing upon the public sidewalk underneath; *Held*, that the defendant was responsible for the whole performance of the work; and it was immaterial whether the death was occasioned by the particular act of the servant, or by that of the other person so engaged

The only limit to the damages which it is in the power of a jury to award, in an action under the statutes referred to, is the sum therein prescribed by the statute,—$5,000.

It is not error for the presiding judge upon a trial to express his opinion on a question of fact, if the final determination of the question is distinctly left to the jury.

Any one who casts ice, snow, or other missiles from the roof of a house upon the sidewalk of a city street, without stationing some one below to warn passers by, is guilty of gross negligence. And if a person passing underneath is injured by the act, it will not be presumed that such person was negligent so as to defeat a recovery of damages for the injury.

In an action by the representatives of a person, for wrongfully causing his death, the judge charged the jury that the wife and child would have been entitled to a support from him, the former during her life, and the latter until the age of 21; and that he would be entitled to their earnings. *Held*, that the charge was correct.

APPEAL from a judgment entered upon a verdict. The action was by the plaintiffs, as administrators of William H. Warner, to recover damages for his death, caused by the negligent act of defendant's servants.

The trial was had before Judge HILTON and a jury, and the charge of the judge presented the principal grounds of exception by the defendant. It was substantially as follows:

"Gentlemen: The first question for you to consider is, whether the death of Warner was produced by the wrongful act or neglect of the defendant; and this necessarily involves the inquiry as to how the death was caused, and whether it resulted from throwing ice or snow from the defendant's roof. There cannot be much question in your minds on this point; and the defendant's counsel seem hardly to have contested it, but it is for you to determine; and if you come to the conclusion that it was thus caused, you are then to inquire whether the ice or snow was thrown by the defendant, or under the defendant's direction, which amounts to the same thing; and on this point the complaint and answer

may be looked into for evidence. The complaint alleges that Mr. Warner was killed by snow and ice thrown from the roof of defendant's house, at the corner of Fifth avenue and Twenty-Sixth street, by the defendant's servant, while acting under his direction; and his answer admits that he did direct Fagan, his servant, to throw the snow off the roof.

"It is thus conceded that the snow was removed from the roof by the direction of the defendant, and as it appears that the direction was general, without any specific instructions as to manner, it follows that the servant had a right to do it in the ordinary way, and to employ assistance if that was necessary. If, therefore, in the performance of such a general direction, an injury to any one, or death, as in this case, was produced, the defendant is liable to the extent of the injury, provided such injury was the result of negligence—a man being, as we all know, liable for the acts of his agents and servants while acting by his direction or authority; but this liability, however, is always dependant upon the condition that the act was wrongful, and the party injured did not contribute by his own neglect to the production of the injury complained of.

"In this case there can be no doubt that the act itself was wrongful, because no person is entitled to throw any substance in a public highway, which may in any manner obstruct it, or diminish its use. It was negligent, because it was an easy matter to avoid any injury by stationing some one on the sidewalk, or in some other place to notify and warn passers by of the danger; here there is no evidence that any such precautions were taken. Nor can any doubt be entertained as to the right of the deceased to travel on this sidewalk; and as there is no proof of any notice or warning to him against going there, it cannot, under such circumstances, be presumed that he contributed to his death by any negligence on his part. If, therefore, upon the views you shall take of the evidence respecting the defendant's liability, you determine that by his wrongful act or neglect, or of those acting under his direction, this death was produced, then the remaining question is, what damages, if any, should be awarded for it?

"The statute which authorizes this action, evidently intended to leave this question entirely with you. It says: 'The jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person,' who, in this case, consist of a wife, and a daughter about ten years of age. And in estimating the amount, the law has fixed but one limit to your discretion, and that is, it shall not exceed $5,000.

"This statute has been termed an extraordinary one, and it is so indeed. It virtually puts a limit to the value of a human life; because a man may recover, at common law, damages commensurate with the injury proven; for the loss of a limb you may award damages without limit, except so far as the evidence may control your consciences; but for the taking of life, you cannot exceed a fixed sum. It cannot cost over $5,000, and within this limit you are confined, provided you find the defendant liable at all.

"I might here stop, and leave the matter with you as the statute does, but it may possibly assist you somewhat, in estimating the extent of the pecuniary injury resulting from the death in question, to point to some of the things which will obviously suggest themselves to your consideration, and among these is the probable duration of Mr. Warner's life. He is proven to have been a man of ordinary health, and about forty years of age; and although the law fixes no definite period for the probable duration of human life, or the life of a person of that age, yet it may be communicated to you, that if this court was called upon, as a court of equity, to determine the value of a life estate of a person of that age, in any specific property, we should assume that he would live ten and about seven-tenth years; that being about the average duration of life of a person of that age, according to certain tables compiled from extensive observations, and called the Northampton Tables, and to which recourse would be had in such cases; although this practice would not control a jury They may, however, have the fact respecting the prac-

tice of the court communicated to them as matter of information, and in that light only I state it.

"I may also inform you that the wife was entitled to support from the deceased during his life, and the child until she arrived at maturity; while on the other hand he would have been entitled to their earnings; and the amount of Warner's income may be considered, to ascertain the character and value of this support, his skill and industry being circumstances tending to increase the probabilities of the continuance or permanency of such income."

The jury awarded the plaintiffs $3,500, and from the judgment entered upon this verdict the defendant appealed. The principal facts in the case, together with the requests to charge and the exceptions taken at the trial, are fully stated in the opinion.

Richard Busteed and Horace F. Clark, for the appellant.

I. The court should have charged the jury, as requested, that in assessing the damages they should take into consideration the money received by the widow on the policy of life insurance.

II. The instructions of the court in respect to damages were calculated unduly to enhance the amount of damages.

III. The court should have charged the jury, as requested, in reference to the liability of the defendant for the acts of Cashan, who was employed by the defendant's servant, and in reference to the burden of proof as to Cashan's agency.

IV. There was no evidence to show any authority from the defendant for the employment of Cashan. Cashan was not the agent or servant of the defendant, and, therefore, the defendant is not liable for Cashan's negligence.

V. The weight of evidence is in favor of the theory that Cashan threw the ice or snow which struck Warner. That question should have been distinctly submitted to the jury as requested.

William Bloomfield, for the respondent.

I. That portion of the charge covered by the exception—

"that there being no particular instruction as to manner, the servant was at liberty to do it in the ordinary way, and to employ assistance, if necessary, and the defendant was liable for the work being negligently done"—was proper and legal. The defendant was liable for the negligence of his servant, whether the act was done in an ordinary or unusual manner, provided it was not wilful. 1 Blacks. Com. 431; 2 Kent's Com. 259 and 260, (marg. paging.)

II. The act was negligent, as charged by the judge. There was no conflict of testimony on this subject; and there was no misdirection. Graham on New Trials, 301, 317; *Woodbeck* v. *Keller*, 6 Cow. 118; *Dean* v. *Hewett*, 5 Wend. 257.

III. The sixth exception is not warranted by the charge. The judge charged, in effect, that Warner had a right to travel on the sidewalk, and that in the absence of any proof of notice or warning, negligence could not be presumed on his part—which was proper. The act complained of, being dangerous to human life, notice should have been proved by defendant. *Loomis* v. *Terry*, 17 Wend. 498, 499.

IV. The judge properly refused to charge with respect to the propositions of the defendant otherwise than as he did charge. 1st. The money received on the policy of life insurance should not have been deducted from the amount of pecuniary injury resulting from the death of Warner, as maintained in the first proposition. *Clark* v. *Blything*, 2 B. & C. 254; *Mason* v. *Sainsbury*, 3 Douglass, 60; *Yates* v. *White*, 4 Bingh. N. C. 272. 2d. The remaining propositions of the defendant were erroneous. *a.* The answer admits that the snow was cleared off by the direction of the defendant, and by his agent. *b.* The defendant, not having parted with the control of the work, was liable for the negligence of Cashan acting in aid of and under the direction of his servant. *Bush* v. *Steinman*, 1 Bos. & Pull. 404; *Randleson* v. *Murray*, 8 A. & E. 109; *Stone* v. *Cartwright*, 6 T. R. 411; *Sleath* v. *Wilson*, 9 Carr. & P. 607; *Booth* v. *Mista*, 7 Carr. & P. 66.

By the Court, BRADY, J.—This action was brought to recover

five thousand dollars damages, alleged to have been sustained by the negligence of the defendant's servant, which resulted in the death of William H. Warner, the plaintiff's intestate. On the trial it appeared that the defendant, on the day of the death of Mr. Warner, directed his servant, Michael Fagan, to take the snow off the roof of his (defendant's) house; and that Michael, having gone for the doctor for the defendant's wife, on his return stopped for a man named Cashan, and asked him to go and help him. That Cashan did so, and that they commenced shoveling the snow from the roof, throwing it into the street from the house top. Some of the snow, or snow and ice thus removed, fell upon the head of Mr. Warner, as he was passing along on the sidewalk.

It also appeared that Cashan went upon the roof at the request of Fagan, to oblige him, and that Fagan was unable to state either who threw the last shovelfull before Mr. Warner was killed, or who threw the snow. It also appeared that, at the time Mr. Warner received the injuries from which his death ensued, his life was insured in the Connecticut Mutual Life Insurance Company for the benefit of Jane C. Warner, one of the plaintiffs and the widow of the deceased, for the sum of $2,500, and that $2,400, that sum being the proceeds of the policy, had been paid to her by the insurance company. The cause having been submitted to the jury, the defendant's counsel requested the court to charge:

1st. That if the jury should find for the plaintiff, then, in assessing the damages, they should take into consideration the money received by the widow on the policy of life insurance.

2d. That if the jury should find that the witness Cashan was employed by Fagan without authority from the defendant, and that the injury to Warner resulted from the act of Cashan, and not of Fagan, the defendant was not liable for the acts of Cashan, and the plaintiffs were not entitled to recover.

3d. That there was not sufficient evidence to justify the jury in finding that Cashan was the agent or servant of the defendant, and the defendant was not liable for his acts.

4th. That the burden of proof was upon the plaintiffs to show that the injury resulted from the acts of the defendant or his servant, and if the jury were in doubt as to whether the injury resulted from the acts of Cashan or Fagan, the defendant was entitled to the benefit of that doubt.

5th. That the defendant was not liable in this action for the negligent act of his servant, unless the defendant was privy to that negligence, and directed or knowingly assented to the particular mode adopted by his servant of removing the snow from the roof.

The presiding judge charged the jury that the first question for them to consider was, whether the death of Warner was produced by the wrongful act of the defendant, and that that question necessarily involved the inquiries, how was the death caused, and was it the result of throwing ice or snow from the defendant's roof? The judge then stated that there could not be much question in the minds of the jury on that subject, that the defendant's counsel seemed to have hardly contested it, but that it was for them to determine. To this part of the charge the defendant excepted. The judge also charged that, it appearing from the pleadings that the defendant had directed Fagan to remove the snow from the roof, and that the direction being general, without any specific instructions as to manner, the servant had a right to do it in the ordinary way, and to employ assistance if necessary; and that if, in the performance of that general direction, an injury to any one, or death as in this case, resulted, the defendant was liable to the extent of the injury produced, *provided such injury was the result of negligence.* The defendant excepted to the instruction, that it followed as a matter of law that the direction, being a general one, if any injury resulted from following it, the defendant was liable. Also to the direction, that there being no particular instruction as to manner, the servant was at liberty to do it in the ordinary way. The judge also charged that in this case there could be no doubt that the act itself was wrongful, because no person was entitled to throw any substance upon a public highway, which might in

any manner obstruct it or diminish its use. That it was negligent, because it was an easy matter to station some one on the sidewalk, or in some other way to notify and warn passers by of the danger. The defendant excepted to so much of this part of the charge as stated that the act was negligent, and also to the instruction that, there being no proof of warning to Mr. Warner against going where he was, it could not *from such circumstances* be presumed that he contributed to his death by any negligence on his part. The defendant also excepted to the instruction that there was but one limit to the damages which the jury might give, and that was that they could not give over $5,000 Also to the instruction that the wife would have been entitled to support from Warner during his life, and their child until she arrived at maturity. The court then refused to charge the requests of the defendant, hereinbefore mentioned, further than they were embraced in the charge made. To such refusal, as to each and every of the defendant's propositions, the defendant excepted.

We have thus presented for our consideration, and in a mode not well designed to facilitate the labors of review, an array of exceptions. It will be necessary to take them up in order, and to see either how far they are sustained by rules of law, or negatived by some feature of the charge to which they relate. In *Mason* v. *Sainsbury, &c.*, (3 Douglass, 61), the action was against the Hundred, under the statute, (1 Geo. I., ch. 5, § 6), to recover damages sustained by the demolition of a house in the riots of 1780. The plaintiff had been insured, and his loss was paid by, and the action was brought for the benefit of, the insurance company. The plaintiff had a verdict, and the verdict was sustained. Lord MANSFIELD said: "The case is clear; the act puts the Hundred, for civil purposes, in the place of trespassers; and upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers had not paid a farthing." In *Clarke* v. *The Inhabitants of the Hundred of Blything*, (2 B. & C. 254), the action was brought for satisfaction and amends for certain attacks

of hay and corn which had been wilfully burned in the Hundred by some person unknown. It appeared on the trial that the plaintiff had been insured, and had received the amount of his loss. He had a verdict, and the verdict was sustained. It will be observed that in this latter case the action was not brought by the insurance company or for their benefit. And so in *Yates* v. *Whyte*, (4 Bingham N. C. 272), the action was brought to recover damages sustained by the plaintiff by reason of the defendant's vessel having run foul of the plaintiff's vessel, by and through the carelessness and mismanagement of the defendant. The plaintiff had a verdict. The underwriters had paid the plaintiff the sum expended in repairs, and that sum was deducted by the arbitrator to whom the matter was left, from the damages sustained by the plaintiff. This was held to be erroneous. TINDAL, Ch. J., said: If the plaintiff cannot recover, the wrongdoer pays nothing, and takes the benefit of *a policy of insurance without paying the premium*. BOSANQUET, J., said: "How could the trespassers have availed themselves of this satisfaction? Could they have pleaded it by way of accord and satisfaction? It was not paid as a satisfaction for a trespass, and the facts of the case would not have supported such a plea."

On principle and authority, then, the jury should not take into consideration the money received by the plaintiff, Jane C. Warner, from the insurance company. But, without reference to any adjudicated case, there are principles springing from the relations of the parties, and the statute creating the right of action in favor of the plaintiffs, which forbid the consideration of any benefit elsewhere received. Jane C. Warner was entitled to the whole amount of the policy of insurance. It was for her benefit alone; and it was secured by the payment of a premium to which the defendant did not contribute. The benefits growing out of the right of action here sought to be enforced, are not given to her by the statute, but are given to the widow and next of kin, and do not arise upon any common law liability. They are, therefore, *res inter alios acta*. The case is very different from that which would be presented for an injury to a chattel, and

it rests upon a statute, the object of which was to punish the wrongdoer who by his carelessness destroyed life. There is no privity between him and the insurance company, and the insurance company cannot repair the injuries done by the defendant. They cannot restore to the widow and next of kin of the deceased, the society, advice and protection which he could have afforded them, aside from the pecuniary losses incident to the deprivation which his death occasioned, and thus, either by analogy, or on principle even, the doctrine that an insurance company could be substituted for the deceased in this action, as in the case of *Mason* v. *Sainsbury*, could not apply to this action. But, however that may be, the judge was clearly right in refusing to charge the first of the defendant's requests. The second request was not authorized by law. Fagan was engaged in removing the snow from the defendant's house and by his express direction, when Mr. Warner was killed. It is true that Fagan had asked Cashan to help him, but this does not change the defendant's responsibility. It is said, by Blackstone, (Vol. 1, p. 431, marginal paging), that "a master is chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his majesty's liege people: for the master hath the superintendence and charge of all his household;" and the following cases illustrate the doctrine that where the master has intrusted a servant with the performance of a service, it is no answer, in an action brought to recover damages resulting from the manner in which the service is performed, that the servant acted improperly in the discharge or performance of it.

The master must respond, because he has put it in the power of the servant to do the injury. *Bush* v. *Steinman*, 1 Bos. & Pull. 404; *Randleson* v. *Murray*, 8 A. & E. 109; *Stone* v. *Cartwright*, 6 T. R. 411; *Sleath* v. *Wilson*, 9 Carr. & P. 607; *Booth* v. *Mista*, 7 Carr. & P. 66.

In the last case the defendant was held liable for injuries to the plaintiff's cabriolet, resulting from the negligent manner in which defendant's cart was driven, although it appeared that the

defendant's servant was not driving at the time, but had intrusted the reins to a stranger who was riding with the servant, and not in the service of the defendant.

This is not the case of an independent employment, like that in *Blake* v. *Ferris*, (1 Seld. 48). The defendant did not part with the control of the work. Fagan was his coachman, and was directed to remove the snow. He was intrusted with the duty and the manner of doing it; no specific directions having been given. He sought the aid of another, with whom he acted in concert, both being engaged at the same time, and acting in the same manner, in removing the snow. Aside from this, the evidence of Cashan, if true, and the defendant cannot gainsay it, shows that the injury was not caused by any act of his; but however that may be, upon the principle established by the cases referred to, it was wholly immaterial whether the death of Mr. Warner was occasioned by either Fagan or Cashan, and therefore the second request was not well made. This also embraces the third and fourth requests, because they relate to and are a part of the theory presented by the second request—that Cashan may have caused the death of Mr. Warner, and was not the servant, or in the service of the defendant. It also embraces the second and third exceptions to the charge, which were taken independently of those founded on the requests. The fifth request is also embraced in the legal rule which has been stated. The employment and direction was general, and it has never been held necessary to show that the master was privy to the negligence of his servant, nor has it ever been engrafted as one of the principles of law, by which the relation of master and servant are governed, that the manner in which a service is performed on a general direction, must be shown to have been assented to by him, in order to charge the master for injuries occasioned by such mode or manner. The counsel for the defendant has not presented any authority bearing upon such a proposition. The fifth request was, therefore, properly refused. The sixth exception to the charge was not well taken. The jury having determined that the deceased died of the inju-

ries received through the negligence of the defendant or his servants, the only limit to their award of damages was the sum of $5,000. The statute has, in effect, so declared. It declares that the jury in every such action may give such damages as they may deem a fair and just compensation, not exceeding $5,000. Laws 1849, p. 388.

The first, fourth, and fifth exceptions to the charge were not well taken. The judge said there could not be much question in the minds of the jury as to the cause of the death of Warner, but left that fact to the jury to determine. This was not a misdirection, or erroneous. Whatever may have been the opinion of the judge, the fact was left to the determination of the jury. The first exception was to this part of the charge. The judge also said that the act was negligent, because it was an easy matter to station some one on the sidewalk, or in some other way notify and warn passers by of the danger; and further, that no doubt could be entertained as to the right of the deceased to travel on the sidewalk, and there being no proof of any notice or warning to him against going there, it could not, under such circumstances, be presumed that he contributed to his death by any negligence on his part.

The act complained of was done by the defendant or his servant, and was negligent. There was no conflict on the subject, and the charge of the judge was warranted by law. *Woodbeck* v. *Kelly*, 6 Cow. 118; *Dean* v. *Hewett*, 5 Wend. 257; Graham on New Trials, 301, 317.

The act complained of was dangerous to human life, and notice should have been given. *Loomis* v. *Terry*, 17 Wend. 498, 499. No such precautions were in fact taken. There was no evidence offered thereto, and nothing appears in the case justifying a pretence thereof. As stated, therefore, the first, fourth, and fifth exceptions were not well taken. I do not understand on what basis the defendant placed an exception to the instruction, that the wife of Mr. Warner and his child would be entitled to support from him, the former during his life, and the latter until she attained the age of 21 years. The judge, at the same

time, said that Mr. Warner would be entitled to their earnings, and this was a correct statement of the legal rights and liabilities growing out of the relations of husband and wife and parent and child, and was a proper consideration in reference to the question of damages. The exception was, therefore, not well taken. I think it can be shown that some of the exceptions to the charge stated and considered, were not warranted, taking the whole charge together, but I deem it unnecessary, the exceptions having been disposed of standing alone. There remains one exception to be considered. The defendant offered to show that a former coachman of his, in 1854, under a similar direction to take snow from the roof, without instructions as to where it should be thrown, threw it into the defendant's yard. The evidence of that incident would doubtless furnish an excellent recommendation to the former coachman; but nothing bearing upon the issue involved. Proving that a former servant did a similar service correctly, does not seem to be relevant to the question whether another servant did it carelessly. It is my opinion, therefore, that the offer was properly rejected.

On a consideration of the whole case, and for the reasons assigned, I think it clearly appears that there is nothing in it which would justify us in disturbing the verdict rendered. The circumstances under which Mr. Warner was killed present, in legal contemplation, no mitigating features. In the full possession of his faculties, and while in the exercise of a lawful right, he was suddenly, and without fault on his part, stricken down by an act not only grossly careless, but exhibiting, in my judgment, a disregard of human life deserving severe condemnation. In traversing the highway, the deceased was under no obligation to anticipate or expect the act by which his death ensued. He was not bound to look aloft to see that no missile or substance cast from the housetops, or any other elevation, should do him bodily harm, and although the defendant did not cause the death by his own hand, this case may be said to illustrate the wisdom of the legislature in providing the redress granted. Whatever may be our sympathies for the man who

is unfortunate enough to suffer by the negligence of his servant, there are other and higher considerations which must control, and yield us pleasure when employed in vindicating the rights of society to perfect security in the enjoyment of life and property.

Judgment affirmed.

WILLIAM F. MOTT *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

The rule of law, that an owner of land fronting upon a highway, is *prima facie* the owner to the centre of the road, subject only to the public easement over it, is applicable to the streets in the city of New York.

Therefore, in the absence of any proof upon the subject of ownership of the soil in the streets, the title to it must be presumed to be in the adjoining owner, and not in the corporation of the city.

Since the law relative to altering the grades of streets in the city of New York (Laws 1852. chap. 52, p. 46,) the common council cannot change or alter the grade, in whole or in part, of any street below Sixty-third street, except upon the written consent of the owners of at least two thirds of the land fronting upon the part of the street proposed to be altered.

The common council of the city, upon the application of less than two thirds of the owners affected, passed an ordinance changing the grade of Vandewater street. In carrying the ordinance into effect, they caused the street to be excavated to the depth of six feet, whereby the premises of the plaintiff fronting on it were seriously injured. *Held*, that the ordinance was void, and the corporation was liable for the injury produced.

In passing an ordinance changing the grade of a street, the common council of this city act under a special and limited power, and where it is shown that the facts did not exist which would warrant its exercise, the ordinance is not only void, but affords no protection to any person acting under it.

A municipal corporation is liable for the damages occasioned by its illegal exercise of a corporate power.

The provisions of law allowing parties to be witnesses in their own behalf, are applicable to actions wherein a municipal corporation is a party.

APPEAL by the defendants from a judgment entered at special term upon the verdict of a jury. The material facts in the case are fully stated in the opinion.

Abraham R. Lawrence, Jr., assistant corporation counsel, for the appellant.

I. The objection of defendants' counsel to the right of the plaintiff to testify on the trial, should have been sustained by the court. The law of 1857, allowing parties to be witnesses in their own behalf, is not applicable to actions in which a municipal corporation is a party.

II. The fee of the streets is vested in the mayor, aldermen and commonalty, and they have the general right, independent of any new legislative act, to alter their grade.

III. The plaintiff cannot, in this collateral action, review or reverse the proceedings of the defendants in passing the ordinance of April 20th, 1857, amending the grade of Vandewater street for work done under the same. *a.* The passage of the ordinance was a judicial act. The common council are a quasi-judicial tribunal when acting upon such an ordinance, and their judgment is final and conclusive. *Rochester White Lead Co.* v. *City of Rochester*, 3 Comstock's Rep. 463; *Wilson* v. *Mayor*, 1 Denio, 595. *b.* There were ample remedies open to the plaintiff to which he might have resorted for redress, if the ordinance was improperly passed. 1. By a *certiorari* he could have brought up all the proceedings of the common council, and could have had them reversed if improper. *Matter of Mount Morris Square*, 2 Hill, 27–8; *Storm* v. *Odell*, 2 Wend. 287; *People* v. *Mayor of Brooklyn*, 6 Barb. 209; *Same* v. *Same*, 9 Barb. 535. 2. By a mandamus he might have compelled the defendants to desist from doing any work under the ordinance. 3. He might have obtained a writ of prohibition against the common council, acting as a quasi-tribunal, from taking any proceedings to change the grade. *People* v. *Supervisors of Queens*, 1 Hill, 196, 205. And he has been guilty of laches in not pursuing one or other of these several remedies. *c.* This action is not brought to recover damages for negligent or unskilful performance of the work by the ordinance directed to be done, but for doing work at all under that ordinance. In other words, it is an attempt to recover damages for the enforce-

ment of a judgment of a tribunal having jurisdiction, which judgment remains unreversed.

IV. Even if the respondent can attack the proceedings of the common council in this action, and go behind the ordinance, if it appears, as it does here, that they had an application before them for a change of grade, their finding or determination upon the question whether the applicants owned two thirds of the lineal feet on the street is conclusive, and the plaintiff cannot show that in fact they did not own such a number of feet. This determination would be conclusive on a certiorari. *People* v. *City of Rochester*, 20 Barb. 449. And it must be more conclusive (if anything) in a collateral action.

V. But conceding that the ordinance is invalid, because the written consent of two thirds of the owners in interest of the property on the line of the street has not been obtained, the appellants are not liable. *a.* The passage of such ordinance was a violation of law by the individuals comprising the common council, for which they would be personally liable. *Sanders* v. *Springsteen*, 4 Wend. 429; *Ontario Bank* v. *Brunell*, 10 Wend. 186; *Weaver* v. *Devendorf*, 3 Denio, 117; *Prosser* v. *Secor*, 5 Barb. 607. *b.* In passing an illegal ordinance, the members of the common council acted beyond the scope of their powers; and a corporation is no more bound to answer for acts done by its officers, beyond the scope of their powers, than an individual is bound by the unauthorized acts of his agents.

Monell, Willard & Howe, for the respondents.

I. There is no evidence that the fee of Vandewater street belongs to the defendants. The presumption is, that the fee belongs to the owners of the adjacent property, subject to the easement of the highway. This principle is too well founded to require the citation of authorities. 2 John. 357; 15 Id. 447; 19 Wend. 659.

II. The plaintiff is not seeking in a collateral action to review or reverse the proceedings of the common council in passing the ordinance. So far as the common council acted in a quasi-

judicial capacity, they merely considered the expediency of the improvement. They could not, and did not adjudge that 18 feet is two thirds of 280, and their action in changing the grade was wholly illegal. *Waddell* v. *Mayor, &c., of New York*, 8 Barb. 95.

III. The determination of the common council upon the question, whether or not the petition contained the names of the owners of two thirds of the property, cannot be conclusive upon the rights of the plaintiff. It would be just as reasonable to say, that the common council can adjudge that two and two make five. *Graves* v. *Otis*, 2 Hill, 466.

IV. The legal liability of the defendants, upon the facts admitted and proved in this action, is clear. 1. In changing the grade of Vandewater street, the defendants acted upon a subject within their control, but acted in an illegal manner. *Howell & Christopher* v. *The City of Buffalo*, 15 N. Y. Reports, 512; *Lacour* v. *The Mayor*, 3 Duer, 406; *St. John* v. *The Mayor*, 6 id. 315; *Hutson* v. *The Mayor*, 5 Selden, 163; *Adset* v. *Brady*, 4 Hill, 630; *Conrad* v. *Trustees of Ithaca*, 16 N. Y. Reports, 158; *Kicock* v. *Plattsburgh*, cited in above. 2. By the statute, the owner of property damaged by the change of grade is entitled to be paid by an assessment upon the property benefitted. The fact that the defendants have, by their own illegal act, put it out of their power to lay a valid assessment for this purpose, cannot deprive the plaintiff of his right to compensation. His only remedy is by the present action, in which he is clearly entitled to his judgment.

By the Court, HILTON, J.—The plaintiff brought this action to recover of the defendants the damages he sustained by reason of their illegal interference with the established grade of Vandewater street in this city. It appeared on the trial that the plaintiff was the owner of two houses and lots fronting on Vandewater street, the grade of which had, for a long time previous to the interference complained of, been fixed and established; that on April 20, 1857, the defendants adopted an ordinance or resolution, altering the grade, which had been so previously fixed,

and thereupon, pursuant to such resolution, they entered upon the street, and excavated it to the depth of about six feet, whereby it was, for a time, rendered less passable, and the premises in question had to be altered, so as to conform to the new grade thus created. It was admitted that this change of grade was made without the consent of the owners of two thirds of the land, in lineal feet, fronting on and adjacent to such change; the owners of only about eighteen feet consenting to it, while the length of the change was about two hundred and eighty feet. After showing the damage resulting from this act of the defendants, the plaintiff rested. The counsel for the defendants then moved to dismiss the complaint upon various grounds, which will be hereafter noticed, but the judge denied the motion, and submitted the question of damage to the jury, who found in favor of the plaintiff for $1,039.87.

The defendants appeal, and their argument may be briefly stated thus:

1st. That they are owners of the fee of the streets of the city, and have the general right, independent of any legislative act, to alter their grade at pleasure.

2d. That their proceedings, in altering the grade of Vandewater street, cannot be reviewed collaterally, and that no action lies for damages arising from acts done by them under their proceedings.

3d. That, as it appeared on the trial that the defendants had before them an application by some of the owners for a change of the grade, the finding of the common council of the defendants that such applicants owned two thirds of the land, in lineal feet, on the street proposed to be changed, was conclusive; and the plaintiff cannot be permitted to show the contrary.

These propositions, if correct, seem to me to require us to take judicial notice of the alleged ownership by the defendants of the fee of the streets in this city; and to hold that their acts in respect to any change of their grade are discretionary, and not subject to inquiry; but a brief examination of the authorities will suffice to show that no such immunity exists.

The streets of the city are for the use of the public as highways, and all the rules of law respecting highways apply to them with full force. One of these rules is, that the adjoining owner is *prima facie*, and of common right, also owner to the middle of the road, subject only to the public easement over it. Woolrych on Ways, 5, 6; 3 Kent's Com. 432; *Matter of John and Cherry Streets*, 19 Wend. 659, 675; *Cortelyou* v. *Van Brunt*, 2 John. 356; *Matter of opening 17th Street, N. Y.*, 1 Wend. 262; *Rogers* v. *Bradshaw*, 20 John. 743; *Jackson* v. *Hathaway*, 15 id. 447. Therefore, in the absence of any proof upon the subject of the ownership of the soil of Vandewater street, the title to it must be presumed to be in the adjacent owners, and not in the defendants.

Prior to 1852, it cannot be denied that the defendants might, at any time, in their discretion, alter the grade of a street within the city limits, (Kent's Charter, 58, 59; Law 1813, 2 R. S. 407, § 175), and for any injuries sustained by adjoining owners in consequence of such alteration, no action for the recovery of damages would lie, (*Wilson* v. *The Mayor, &c., of N. Y.*, 1 Denio, 595; *Waddell* v. *The Mayor, &c., of N. Y.*, 8 Barb. S. C. R. 95); but in that year the legislature saw fit to restrain in some degree this unlimited discretion, and to limit its exercise to certain cases, providing at the same time a means of compensating parties for the necessary injuries which usually flow from such an act being carried into effect. Accordingly, a law was enacted (Laws 1852, c. 52, p. 46,) the first section of which declared that the grades of streets, as then fixed and established by the common council of New York city, south of 63d street, should not be changed or altered except as thereinafter provided. By section 2, provision was made for proceedings by which a grade might be changed; but it was there declared that it should not be lawful for the common council to alter or change, in whole or in part, the grade of any such street, "except upon the written consent of the owners of at least two thirds of the land in lineal feet fronting on each side of the street or avenue, opposite to and adjoining that part thereof, the grade of which was to be changed or altered," and thus to this extent an absolute restriction was put upon the power

previously exercised by the defendants, and it was made unlawful for them to proceed to change the grade of Vandewater street, except upon the written consent of two thirds of the owners affected.

It is, therefore, quite clear that the ordinance under which the defendants acted, was not discretionary, as the defendants claim; but contrary to law, and their acts under it unlawful. Without the consent referred to, the defendants had no jurisdiction or right to pass it, and it being void they had no right to enter upon the street and do the act complained of, for the purpose of carrying it into effect. *Graves* v. *Otis*, 2 Hill, 466; *Prosser* v. *Secor*, 5 Barb. 607.

It is true, as claimed by the defendants, that the common council in passing the ordinance acted judicially, but their jurisdiction was special and limited, and of a nature which may always be inquired into. And where the facts do not exist to confer the jurisdiction exercised, the act is not only void but affords no protection to any one proceeding under it. In this case it is as if no ordinance had been passed, and the defendants stand before the court as naked trespassers, digging up the public highway in front of the premises of the plaintiff, and by reason of which he has sustained an injury. *Bigelow* v. *Stearns*, 19 John. 39; *supra*, and cases cited; 5 Barb. 607.

As we have seen, the act complained of was within the corporate powers of the defendants, had they proceeded about it in a proper manner. They possess the right to change the grade of Vandewater street upon the consent of two thirds of the owners, and to cause the damages done to the owners of lands on the street to be assessed upon other lands which may be benefitted by the change; but what was done in this case was an illegal exercise of a corporate power which the defendants plainly possess, and for the damages produced by such acts, admitted to have been done under their direction, they are undoubtedly liable in an action like the present. *Howell* v. *City of Buffalo*, 15 N. Y. Rep. 512; *Lacour* v. *The Mayor, &c., of N. Y.*, 3 Duer, 406; *Hutson* v. *The Mayor, &c., of N. Y.*, 5 Selden, 163.

I have not referred to the exception taken by the defendants' counsel at the trial, to the admission of the plaintiff as a witness. This court having decided in *Wallace* v. *The Mayor of N. Y.*, (*post*), that the law allowing parties to be witnesses in their own behalf, is applicable to actions to which a municipal corporation is a party.

Judgment affirmed.

WILLIAM AND JAMES W. SMITH *v.* HENRY COE, IMPLEADED WITH JOSEPH NAYLOR.

N. agreed for a specified sum to erect a building for C. No plans or specifications were settled upon. From the commencement of the work to its completion, the contract had been, by mutual consent, so substantially and materially departed from that it was impossible, from the evidence at the trial, to ascertain the extent of the alterations in the contract, which was originally intended to control in the erection of the building.

Held, that the case should be regarded as one where it had been shown that the building was erected under a general employment, and in respect to which the owner was under an implied obligation to pay what the work and materials were reasonably worth.

Parties furnishing labor or materials towards the erection of a building under such a general employment, may acquire a lien under the mechanics' lien law, for the value of such materials and labor.

When a party agrees to erect a building in a specified manner, whether the sum to be paid for it is agreed upon or not, if he abandons the work before its completion he can recover nothing.

Or if he fails to construct a building in every essential particular in accordance with the contract, unless performance is waived by the other party, he cannot recover.

The use or occupation of the building by the owner will not be deemed a waiver of performance of the contract, so as to authorize an action to be maintained upon it by the builder.

A substantial compliance with the terms and conditions agreed upon for the construction of the building, is a condition precedent to the right of the builder to maintain an action upon the contract.

It is essential to the establishment of a mechanic's lien upon premises, that at the time of filing the notice thereof, there was actually due or owing from the owner to the original contractor, upon his contract, a greater sum than the amount of the lien claimed.

The lien creditor succeeds only to the rights and claims which, at the time of filing the notice, are possessed by the original contractor, and unless such facts are established as would, in a proper action, entitle the original contractor to recover, the lien creditor cannot.

It seems that if the original contractor and the owner should make a fraudulent settlement for the purpose of depriving parties furnishing labor or materials of any lien therefor, the court would disregard it.

APPEAL by the defendant Coe from a judgment entered against him at special term in favor of the plaintiffs. The action was brought under the mechanics' lien law to foreclose a lien acquired by filing a notice thereof on September 24th, 1857, upon the ground that the plaintiffs had, at the request of Naylor, furnished materials which were used in the construction of a building belonging to the defendant Coe, and erected for him by Naylor under the following contract:

"I agree to erect a building on the lots corner of East and Cherry streets, as per plans and specifications, bearing this date, and signed by me and Henry Coe; and agree to make any alterations that may be suggested by him, (provided the additional expense of the said alterations does not exceed three hundred dollars), and finish the same under the directions of Henry Coe, in a good and workmanlike manner, and of the best materials, for the sum of fourteen thousand dollars, payable as follows: When the materials are delivered on the ground, and a receipted bill of the same is handed over, then the same will be paid to the sellers of said materials to the extent of nine thousand dollars in cash, and the balance when the whole building is finished in every respect, and the same is ascertained to be free from any or all claims of any kind for labor or materials, then the store No. 14 Moore street, is to be conveyed (subject to a mortgage of $3,850,) to J. Naylor, or his assigns, as payment in full for the remaining five thousand dollars.

NEW YORK, 28th May, 1857.

JOSEPH NAYLOR.

Witness—CHAS. A. COE.

"I agree to make an additional story on the building now being erected by me on the lots corner of East and Cherry streets, so that the whole will be three stories high, and on a level with the floors of store 755 Water street, and finish the same, under the directions of Henry Coe, in a good and workmanlike manner, and of the best materials, for the sum of five thousand five hundred dollars, (making the whole cost of building when completed, $19,500), payable as follows: When the materials are placed on the ground, one-half, or $2,750, and when the roof is on and tinned, the rest, or $2,750.

NEW YORK, 7th July, 1857.

JOSEPH NAYLOR."

The defendant Coe answered, and alleged that the building was erected under these contracts; that he had paid Naylor the $19,500 therein mentioned, and also the sum of $3,563.76 for extra work, independent of the contracts, and that at the time of filing the notice of lien, or since, no sum of money whatever was due, or to become due, to Naylor, on account of the erection of the building. Also, that on August 29th, 1857, Naylor failed to complete his contracts and abandoned the work—the building being then in an unfinished state—and that the defendant Coe had been compelled to complete the same at an additional expense of about $1,500.

The action was tried before Judge DALY, without a jury, who found, as matter of fact: That on the 24th of September, 1857, the day the lien was filed, there was due from the defendant Coe to the defendant Naylor, a larger sum than the plaintiffs demand; and, as a conclusion of law, that there was due to the plaintiffs the sum of $1,737.53, with interest from the twentieth day of August, 1857, for which sum the plaintiffs had a lien upon said premises; to which several and respective findings, of fact and of law, the defendant Coe excepted.

The testimony at the trial, as shown by the printed case, was not only conflicting in its essential parts, but in addition was quite indefinite, so as to be almost unintelligible, arising from the

contradict material parts of the principal witnesses. Judge Daly in his opinion has so fully commented upon these things and the other points given such comments upon the facts proven, that it is unnecessary here to do more than to refer to them for all the particular information which may be needed for a complete understanding of the case.

William Curtis Noyes and Hoffman & Pierson, for the appellants.

I. Naylor was the only witness to prove the indebtedness and his compliance with the terms of the contract; but he was utterly discredited, and his testimony should have been disregarded. 1. On the 17th August, 1857, he gave a receipt in full for all work which he does not explain, and yet he pretends to claim a large sum still due him. 2. He subsequently swore, on an examination in a proceeding supplementary to an execution against him, that nothing was due him from Coe. This was on the 15th September, 1857. 3. He also agreed to accept, and did accept, $22,500 in full.

II. This receipt was given and the deposition made before the lien was filed, and before any claim of the plaintiffs attached, and such a receipt cannot be annulled or set aside in this indirect mode by a proceeding under the lien law, without any pleadings or preliminary allegations impeaching its validity.

III. But the contractor, Naylor, was not entitled to anything, as he admitted he had been paid $23,000, which was more than the contract called for, being $19,500, for he had never finished the building. In fact, he was paid over $25,000, and then he *abandoned* the building nearly a month before the lien was filed. Even, therefore, if he had done *extra work* by the express or implied permission of Coe, this only made such extra work an addition to the work called for by the contracts, and upon well settled principles he could recover nothing, either for the original or the extra work, until his entire contract was performed, which has never been done. *Pullman* v. *Corning*, 14 Barb. 174; *S. C.*, affirmed, 5 Selden, 93.

Thomas C. Fields, for the respondents.

DALY, First Judge.—In the law, as laid down by my brother HILTON, I fully concur. I differ only as to its application to the facts of this case. I agree that if Naylor entered into a special contract with the defendant Coe, to erect a building of a certain kind or description for $19,500, that he was fully paid before the plaintiffs filed their lien, and that nothing would be due from Coe to Naylor, to which the plaintiffs' lien could attach; or that if Naylor agreed to erect a building in a specified manner, whether the sum he was to receive for it was agreed upon or not, and abandoned the work before it was completed, that he could recover nothing. Whatever doubts may have previously existed upon the point, it is now settled to be the law of this state, (*Smith v. Brady*, 17 N. Y. Rep. (3 Smith,) 173), that if a contract is entered into for the erection of a building, in which the nature of the structure and the materials of which it is to be composed are agreed upon and specified, that the builder must perform his contract in every essential particular, unless performance is waived by the other party. That the use or occupation of the building by the owner will not be deemed a waiver, or such an acceptance of the building as will entitle the builder to sue upon the contract, leaving the owner to deduct his damages from the contract price, but that a substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action upon the contract. "Every one," says COMSTOCK, J., "has a right to build his house, his cottage or his store, after such model and in such style as shall best accord with his notions of utility, or be most agreeable to his fancy. The specifications of the contract become the law between the parties until voluntarily changed. If the owner prefers a plain and simple Doric colum, and has so provided in the agreement, the contractor has no right to put in its place the more costly and elegant Corinthian. If the owner, having regard to strength and durability, has contracted for walls of specified materials to be laid in a particular manner, or for a given

number of joists and beams, the builder has no right to substitute his own judgment or that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he engaged to erect. He can demand payment only upon and according to the terms of his contract, and if the conditions on which payment is due have not been performed, then the right to demand it does not exist."

This rule, which denies to the contractor who abandons the work before he has completed it, or who in completing it has substantially departed from what was agreed upon, any remuneration for what he has done, is one in respect to which great diversity of opinion has existed. And the obligation, in such a case, of the party who has the possession and enjoyment of the labor and materials of another, to make at least some compensation for what he has received, after a full and liberal allowance has been made to him for any damage he may have sustained by the non-performance of the contract in its entirety, has been recognized and upheld by the judicial tribunals of Massachusetts and New Hampshire. *Hayward* v. *Leonard*, 7 Pick. 181; *Smith* v. *First Congregational Meeting House in Lowell*, 8 id. 178; *Britton* v. *Turner*, 6 N. H. 481. The more rigid rule, to which we have adhered in this state, has its foundation in the policy of securing the full and faithful performance of contracts where the contract clearly and expressly specifies what is to be done, for the reason that a more lax and less rigid rule would afford encouragement to parties to abandon, or execute, their contracts as their interest or caprice dictated; and though it may inflict upon the defaulting contractor a very heavy pecuniary punishment, by giving to the other party what the contractor has done, without paying anything for it, still that consideration is unimportant, weighed against its healthy and beneficial effect as a general rule.

The rule, however, can be applied only in cases where a special contract has been entered into, and the distinction in the present case is, that the contract under which Coe and Naylor acted cannot be regarded as a special one as respects the nature

of the building to be erected, the materials of which it was to be composed, or as to the amount which Coe was to pay. The case, as settled, is but a very imperfect statement of the evidence which appeared upon the trial, as I took it for granted, in settling it, that the plaintiff had, in his amendments, embraced all that he considered material, and I looked no farther than to see whether the amendments objected to were correct. Still, imperfect as the case is, it sufficiently discloses, for the purposes of this review, what the nature of the contract was, and that it cannot be regarded as defining the plan of the building, the materials that were to be used in its construction, or as fixing the amount ultimately to be paid.

On the 28th of May, 1857, Naylor agreed in writing, to erect a building as per plans and specifications signed by him and Coe, to be finished, *under the directions of Coe*, in a good and workmanlike manner and of the best materials, for $14,000, Coe to pay for the materials to the seller as the same were delivered at the building, to the extent of $9,000, and when the building was finished, Coe was to convey the store 14 Moore street to Naylor, subject to a mortgage of $3,850, as payment in full for the remaining $5,000. Naylor further agreed to make any alterations suggested by Coe, provided the expense did not exceed $300. Though the contract refers to the plans and specifications signed by Coe and Naylor, contemporaneously with the making of the written agreement, no plans or specifications were signed. Specifications in writing, bearing the same date as the written agreement, and to which the name of the defendant's brother as a witness was attached, were read in evidence, and which the brother Charles Coe testified were specifications drawn up by the defendant, and on which the contract was based. Naylor admitted that a specification was shown to him at the time of the making of the contract, that one was given to him at that time, which was lost, and that he might have seen the specifications exhibited in court before, but that he never signed any specifications or worked by any; that he was to draw a specification to work by, which was to be given to Coe, but that he never drew one. The defendant's

brother testified that the reason why Naylor did not sign the specifications was, that one or two alterations were made, and Naylor wanted a fair copy. Conceding, upon this testimony, that the specification exhibited in court was the one referred to in the written agreement, that it was delivered to and accepted by Naylor, as constituting a part of the agreement then made, it is apparent upon the mere inspection of it, that without the plans it furnishes no guide as to the nature of the structure to be erected. It was drawn by the defendant, and is entitled specification of carpenter's work and materials required to build a *two story storehouse*, corner of East and Cherry streets. It provides for the thickness of the walls, but their heighth or the dimensions of the building, the number of openings, such as windows, &c., are unascertainable without the plans. It is specific as to certain materials to be used, and silent as to others. It does not appear whether the building is to be of brick or of stone. It is not only defective in omitting to specify some of the most essential of the materials, but in matters where it is specific, it has, under the direction and assent of the defendant, been so materially departed from in the use of materials and in other matters in which it is specific, that I came to the conclusion that whatever may have been the understanding of the parties when this specification was drawn, whether they intended or not that it was to form part of the written agreement of the 28th of May, 1857, when that agreement was signed by Naylor, that it was very clear that neither party regarded this specification as controlling or as binding upon either, but that the building, materially altered from the first design or intention, whatever that was, was carried on by Naylor under the direction of Coe, so as to become, both as to the nature of the structure and in the cost and expense of building it, something very different from what either party had in view when Naylor signed the agreement of the 28th of May, 1857.

About a month after that agreement was made, that is, on the 7th of July, an important change was made—the addition of another story—by which the building was made three stories in heighth. This Naylor agreed, in writing, to do in a workman-

like manner, and of the best materials, for $5,500; making in all, as he expressed it in the writing, for the whole cost of the building, when completed, $19,500; one half of the additional $5,500 to be paid when the materials were placed on the ground, and the other half when the roof was on and tinned. This writing might be regarded as a distinct understanding and agreement, on the part of Naylor, as to what the cost of the whole building was to be, or as to what he had agreed to erect it for; and if I could have said, upon the evidence, that no alteration or change had been made after that time, but that the building, as then carried forward, and ultimately completed, was exactly what was then intended, or if changed, that the alteration or change had been made by Naylor, without the concurrence or authority of Coe, then I might have held that Naylor was entitled to but $19,500, and had been fully paid that amount. But I would have been entirely unwarranted in drawing any such conclusion from the evidence. Naylor, in his testimony, has enumerated changes that were made in the character of the materials and in the nature of the structure, which, limiting myself to those which I concluded, from the evidence, were made after the agreement for the third story was entered into, involved an additional expense of over $6,000, the last item of which was the difference between spruce instead of hemlock for the roof. Naylor also testified that the difference in cost between the building first contracted to be built and the building as finished, was about $12,000, in consequence of changes made from the original contract. In this he is not contradicted, and we must assume the fact to be true. The specification given in evidence is imperfect, and, without the plans, it is impossible to say what kind of building was contemplated by the original contract, except so far as it is indicated in the testimony. It is this difficulty, the utter impossibility of fixing, by the evidence, upon the kind of building that was to be erected, that leaves this case deficient in an element essential to the existence of a special contract. If we could gather from the written instruments and the oral testimony the exact nature of the building to be erected,

and the kind of materials to be used in its construction, as a thing settled and agreed upon between the parties, we should then have, what does not exist in this case, the proper starting point. That being clearly defined and specified, any additions made would be extra work, the value or cost of which could be added to the contract price, and the matter would be very simple. If the specifications given in evidence by the defendant had been signed by Naylor, they would, as far as they go, be binding upon him: but we have Naylor asserting that the specification handed him at the time of the making of the contract did not call for yellow stone girders, and in his cross-examination, admitting that the paper shown him contained everything in the original specification, but at the same time declaring that alterations commenced from the foundation, that he never paid much attention to the specification, but went on and built the building as Mr. Coe and Mr. Lawrence told him to. That it was built under the directions of Mr. Coe and Mr. Lawrence, and that he told Coe that the building would cost a great deal more as he was going on. That about ten days after he commenced, they objected to the use of old timber, and that after that he went on and built as they directed, and when they gave no directions, he went on and built himself, and that the difference between old and new timber added five thousand dollars to the cost of erection. Coe's brother, however, testified that Naylor could not get yellow pine timber, and asked permission to substitute other timber. That when Naylor commenced putting down the foundation the defendant objected to his putting down old timber, as the specification called for new timber—yellow and Georgia pine—which was not strictly the fact, and that Naylor put down new. This witness also testified that some spruce was used, which was an inferior article, and that the specification called for the best kind of timber of every description—in which he was mistaken, as, with the exception of the seven rows of girders and posts through the first story, which were to be of yellow pine timber, no other timber is mentioned in the specification but good merchantable quality spruce timber. This witness was inaccurate in several

other important particulars. I thought his testimony, upon the whole, very loose and general; and having found him inaccurate in several material points, I did not regard his testimony as controlling upon any point. But even this witness testified that the contract was varied from before the building was finished; how, or by whom, whether with or without the defendant's consent, he does not state, and I merely refer to it to show that even his testimony is not consonant with the existence of a special contract, the entire performance of which, according to terms stipulated and specified, the defendant has or had a right to exact, but as supporting the theory or conclusion which I arrived at in deciding the case, namely, that whatever may have been the exact understanding of the parties in the beginning, or at any one time, a thing impossible to be determined from the evidence, that it was materially departed from with the full assent, authority and direction of the defendant, so as to leave their contract wanting in those features essential to the existence of a special contract, and which demands for its construction, or for the determination of the rights of the parties under it, a very different rule of law from that which prevails in respect to special contracts.

One important deviation in materials was from spruce to yellow pine timber. This the defendant's witness, Lawrence, says was agreed to. It made a difference in the cost, that is, increased it between $1,200 and $1,500. The building was raised eight feet, which made a difference of $3,500, and made it necessary to give the roof a double pitch, when it was to have but a single pitch. The specifications are silent as to the kind of brick, the general provision being that "all materials were to be of *good merchantable* qualities." Naylor intended to use soft brick on the inside of the walls, and had a right to. There was nothing in the specification to the contrary. Hard brick was used at an extra cost of $3,000. Timber for concrete was used at an extra cost of $500 or $600. These items are referred to, to show how material the deviations were. In addition to which, there were many things not embraced in the specification, and not necessarily a

part of the structure, such as one thousand feet of railway, $750; Corinthian pilasters, $70; and stairway for the hatchway, &c.

Naylor testified as I have said, that the alterations commenced with the foundations, and how material those alterations, changes and additions were, and how greatly they added to the cost of the structure is apparent from the testimony. Naylor says that nothing was said about extra work. Coe paid all the bills up to the plaintiff's bill. Every Saturday, Naylor came to the defendant's store with a list of the laborers, and the defendant's brother paid their wages. In this way the work went on, showing that the agreements signed by Naylor, which stipulated as to the mode of payments were departed from in the beginning. "I was satisfied," says Naylor, "to go on and build as long as Coe paid the bills." And in this way they went on, Naylor following the directions of Coe and Lawrence, and Coe paying all the bills. Under such an arrangement Naylor was little better than a superintendent. He followed whatever directions were given to him, and the means to carry on the work were supplied by Coe, by paying the employees every Saturday night, and paying the bills as they came in. Such a state of things is inconsistent with the supposition that either party acted or supposed they were acting under a special contract for a certain thing at a fixed price. The defendant gave the most unequivocal evidence that he did not. According to the written instrument he was to pay $14,500, and only $11,750 of that before the building was finished, as the remaining $2,750 was to be paid when the roof was on and tinned. For the remaining part of the $19,500, he was to convey to Naylor a store, when the building was finished and cleared of all claims for labor, and yet he paid out in cash, while Naylor was in charge of the building, and before it was completed, $23,642, or nearly $4,000 more than Naylor could have demanded under such a contract, and a large excess over the price specified in the writings. This was and is, to my mind, very conclusive, to show that he did not regard himself as limited by that price, but that he clearly recognized his obligation to pay more. My conclusion was, and still is, that he showed, by his

own act, that the original design or intention of the parties had been materially changed in the progress of the erection, and that the sum named in the writings was no longer the fixed or stipulated cost. He evidently regarded the conveyance of the store in Moore street as no longer a feature in the mode of payment, as he had already paid out in cash several thousand dollars more than the whole sum named in the two agreements, including the store, which was to be equivalent to $5,000.

I did not attach much importance to the receipt, except as an acknowledgment that $19,500 was received by Naylor previous to the 17th of August, 1857, because the defendant, by making subsequent payments—payments afterwards to the amount of $4,142—indicated very clearly that he did not regard it as a final settlement. Nor did I hold the statement of Naylor, when examined upon proceedings supplementary to execution, that Coe had not agreed to give him more than $19,500, but that he had hopes that he would give him something more, as conclusive upon the plaintiff in the action. Naylor having testified, it was receivable in evidence, to be weighed in connection with what Naylor testified to on the trial; but the whole evidence in the case was to be taken together; and if the whole evidence taken together established a different state of facts, the plaintiff would not be concluded by any admission made by Naylor.

It was in proof before me, that the mason and carpenter work of the building as finished was worth $29,529.06. I regret that the testimony of the two very competent witnesses, one a superintendent of buildings, and the other a practical mason, by whom this fact was established, has not been fully inserted in the case, that the mode in which they proceeded, and the basis upon which their estimate was made, might fully appear. But the fact stands upon the record, and the defendant did not attempt to controvert or question it. Lawrence, the defendant's witness, testified that the additional work after Naylor left, amounted to $1,000, so that the materials and work then done was of the value of $28,529. The defendant's brother testified that he paid out $25,000, and that defendant paid out, in addition, $1,000 or $2,937 more than

[illegible]

the [illegible] to have been paid to Naylor [illegible] of the building, and which Naylor contended [illegible] which he did not dispute [illegible] was right there was but $1,000 additional [illegible] and as the work was done under Law[illegible] Lawrence's testimony [illegible] upon that point. I consider [illegible] inference to be drawn from the [illegible] as to payments, or his statement [illegible] the building after Naylor [illegible] of nearly two thousand dollars, [illegible] showing how vague [illegible] of the witness, namely, "after [illegible] he abandoned the building, [illegible] according to his state[illegible] to finish the building and [illegible] with Lawrence as to the [illegible] nearly a month earlier than the [illegible] having found him inaccurate in [illegible] Lawrence as the more reliable wit[illegible] Naylor abandoned, was around the [illegible] after he left: that he saw him, [illegible] the building looking at the men. All [illegible] the abandonment, which the [illegible] was a matter of opinion than of knowledge. [illegible] Naylor left the building, to the best of [illegible] the last September. That he was about the building [illegible] September. Coe swears that he left the [illegible] and Naylor positively denies that he ever abandoned the building. My own conclusion was that Naylor was probably away, or was there but little after the time fixed by Lawrence, and that during this time, which must have been short, for Naylor swears the building was finished in the *beginning* of October; that the foreman went on as usual until the building was finished, the defendant paying him and the other workmen. It does not appear that Naylor ever received a dollar. All that

can be gathered from the evidence is, that the defendant's brother paid as the work progressed, upon Naylor sending him the bills, and that Naylor brought him every Saturday night a list of the laborers, and that he paid their wages. If any money was paid except in this way, it does not appear in the evidence. Now assuming that Naylor left when Lawrence thinks he did, about the last of September, and that the work after that, in finishing the building, amounted to $1,000, in what position did the parties stand? The value of the mason and carpenter work, then, if that included all, which may be doubted, amounted to $29,529.06, and the defendant had paid $23,642. The amount of payments claimed or set up by the answer, is something short of this—$23,063; but $23,642 was the statement given by the defendant to Naylor, and which Naylor admitted on the stand to be correct. I leave out of consideration altogether the statement of Charles Coe, that there were payments to the amount of $26,000, because it was a loose estimate by the witness, in round numbers intrinsically unreliable, and is nearly $3,000 more than is stated or claimed in the answer. Taking $23,642, therefore, as the total amount of payments, it shows an excess of value over payments of $5,887, in which was included the plaintiff's bill of $1,737.53, and the claims of other mechanics, loosely estimated by Naylor at $1,500; all of which has gone into the defendant's building, and the benefit of which he claims to enjoy upon the ground that he has shown a special agreement on the part of Naylor to erect the building as it was ultimately finished, for $19,500. I have sufficiently set forth the reasons that show that any such conclusion is wholly inconsistent with the testimony, and that whatever may have been the understanding of the parties when the sum was fixed upon, it was so materially departed from by the erection of a building worth $10,000 more, that it is now utterly impossible, at least upon this evidence, to say what kind of building was agreed upon for $19,500. The defendant, in his answer, admits extra work to the amount of $3,563.76. Extra work must be an addition made to work previously specified and defined, and to know what is extra we must know what was

previously agreed upon, and this I say cannot be gathered from the specifications, the imperfect and defective state of which, from the want of plans and of matters essential to be inserted, I have already pointed out: in addition to which, alterations and changes commenced almost with the foundation of the building. With this important concession by the defendant, that there was extra work, how are we to get at it? If we say that the original understanding was to erect a building for $19,500, and that afterwards, by alterations, changes or additions, a building was put up of the value of $29,529, we may say that the difference was for extra work. But I maintain that nothing of this kind can be predicated upon this evidence, and that the only proper finding upon it is to hold that it does not show what was to be erected for $19,500, and that in that respect it fails to establish the most essential element of a special contract, and in the absence of proof of a special contract, the legal conclusion is an implied obligation on the part of the defendant to pay Naylor whatever the work, materials and services were reasonably worth. I took the estimate of the two experts as establishing the reasonable value of the work and materials to be $29,529.06, and allowing even that the defendant had paid to the full amount stated by his brother, that is $26,000, that he would still be indebted in an amount very much greater than the plaintiff's claim. That upon the points, in conflict between Naylor and the witness Charles Coe, whether or not Naylor abandoned the contract, I came to the conclusion that he did not. That the work was finished by his foreman as fully as if he had been in daily attendance during the short period that elapsed from the time when he was last seen about the building by Lawrence, that is, after the last week in September, and the time when it was completed, stated by him to have been in the beginning of October. That before that period the building was carried on under the direction of Lawrence and the defendant, and that it continued to be carried on in the same way afterwards under Naylor's foreman, until finished; the defendant paying the bills and the workmen, precisely as he had done before, and that there was nothing in these circumstances

establishing that kind of abandonment which forfeits all claim or right to remuneration for what has been done.

I have dwelt at much length upon this case, as it is a peculiar one, and because I feel that the case would be chargeable with injustice if we were to hold that the defendant is to enjoy the benefit of a building which cost nearly $6,000 more to erect than he has paid for it, upon the ground that the evidence shows a special contract to erect it for $19,500, or a building contracted for at $19,500, and augmented by extra work to the amount of $3,563.76, which is the defence set up by the answer. I am for adhering rigidly to the rule which holds parties to the full or substantial performance of their contracts, but the terms and conditions agreed upon must distinctly appear, or the foundation is wanting for the application of the rule. If the defendant desired the advantage or security to be derived from the express stipulations of a special contract, he should have had those stipulations distinctly and clearly expressed before Naylor began to build, so that if any alterations or additions were afterwards made, they would distinctly appear upon reference being had to the original contract. If they were extra work, it could be shown at once by looking at the original agreement, or if substituted for work therein provided for, what was substituted could be compared with what was omitted, and the extent to which the contract was varied, or the effect that the change might have upon the whole contract, would readily appear. It is this want, in the case, that renders it impossible to say what was extra work or what was change or alteration, or to adopt any other rule than the one I have laid down. The defendant has had the benefit of the $1,700 worth of work and materials, furnished by the plaintiffs, in the erection of the building. He has not paid for it. He is indebted at least to that extent, and the plaintiffs having been subrogated to the rights of Naylor, to the extent of their claim, by the filing of his lien, are, in my judgment, entitled to recover that amount from the defendant.

BRADY, J.—This appeal is presented for our consideration on

[illegible] Both the parties in this trial seem to have acted on the principle that in obscurity there is safety [illegible] and the result is that neither has given us testimony [illegible] entirely satisfactory either in support of or in answer [illegible] Mr. Naylor's statement [illegible] in some instances, inconsistent and irreconcilable, and in others mysterious and unintelligible; while on the other hand the attempted explanations or revelations of the defense are [illegible] inconsistent with some preliminary theory of the defense, or are entirely insufficient to remove the difficulties against which they are arrayed. By the [illegible] contracts, Naylor was to receive $19,500 for building a house on lots of the defendant Coe. He says that alterations were made under the directions of Mr. Coe, and that the difference in the cost occasioned by such alterations was about $12,000, or a change from $19,500 to about $2[illegible]. And again, that the expense of the whole structure was about $31,000, and that the bulk of the difference between $24,000 and $31,000 was *due on the 15th September*, 1857. On that day, however, when under examination upon proceedings supplementary to execution, Naylor said: "I have been Mr. Coe's superintendent of building; I was to build for a certain amount, $19,500. He was to pay the bills, and *anything less than that* I would make. It has *already* cost between $23,000 and $24,000; I have hopes he will give me something for my trouble, *but he has not agreed to do so.*" And notwithstanding this statement, he testifies in this case that there was $9,000 due from the defendant Coe to him on the 24th September—or nine days after his examination under supplementary proceedings.

These statements, in my opinion, are irreconcilable with any other theory than that Mr. Naylor either intended to prevent his judgment creditor from appropriating the claim against Coe, or, having no claim in fact against Coe at that time, he has since, by an extraordinary effort of memory, gathered the details of the one herein stated. Again, Naylor swears that he never told Lawrence or C. A. Coe that if they would pay him $22,500, it would be in full of all demands on the building and for extra work, or anything like it, to them or either of them, or to any one else, and yet Mr. Coe and Mr. Lawrence both swear to the contrary positively, and of their having made a memorandum of Naylor's statement, which he thus denied having made. The defendant relied upon the proof of this offer as controlling, but the payment by him of a sum greater than its amount shows either that it was not accepted or never made. I think the facts and circumstances in relation to it justify either conclusion, and it must be assumed from the judgment that the presiding judge gave full credit to the testimony of Naylor, regarding it not sufficiently impeached by his statement under proceedings supplementary, and herein mentioned, and by the evidence on the part of the defence herein given. Mr. Coe, the defendant, was not examined. If he could have thrown any light on the questions involved, he has not availed himself of the opportunity, and Mr. Naylor, on the fact of the alterations having been made and in relation to the cost attending them, remains not only unimpeached but sustained by the testimony in the cause. The testimony on behalf of the defendant Coe does not explain the manner, mode, or extent of the alleged alterations, nor does it show the value or cost of them, although both of these subjects formed a part of the proof made by Naylor. It would seem from the peculiar complexion, so to speak, of the defendant's proof, that any allusion to the departures from the contract which was authorized, and increased the cost of the building, were avoided as subjects of inquiry. They may have been overlooked, but the impression to be received on a careful perusal of the whole case is apt to be that the defendant chose

to place himself upon the incongruities in Naylor's various statements, and the offer which he herein denies having made. However this may be, giving credit to the testimony of Naylor, I think the plaintiff entitled to recover, unless Naylor, by abandoning the work or failing to perform his contract, nothing was due to him at the time the lien was filed, or became due at any time subsequently. If the testimony of Naylor be received, then it shows such departures from the contract, and such acts and payments in regard to the building, as to justify the conclusion of a total abandonment of the condition or terms of the contract, by which the last payment is made to depend upon the whole building being finished in every respect. But independently of this, the witness Coe, although he states that Naylor abandoned the building about the first of September, says that he was around the building after the 15th, and ordered materials after he left. And further, that he saw Naylor around the building looking at the men after the time mentioned by him as to the abandonment, and that Naylor left his foreman to finish the building. Mr. Coe is not sustained by the witness Lawrence, called for the defence. Lawrence says that Naylor left about the *last* of September, and that he saw Naylor about the building after the *last week in September!* The building was finished in the fore part of October, and Naylor, having been about the building after the last week in September, must have been there in October. Naylor himself says: "I can't say I entirely finished the building." This is not a case, however, on the facts disclosed, whatever may be the fact of abandonment, to which the rule is to be applied that, the contractor having failed to perform his contract, nothing is due. The amount claimed by the contractor is for extra work and materials caused by alterations in the plan of the building, and that there can be no doubt of the character of the work is shown by Naylor's receipt, introduced by the defendant Coe, acknowledging the payment of the contract price or sum, namely, $19,500, in full settlement for building store as *per contract.* From this receipt, it follows, aside from the testimony, that the contract price had been earned and paid,

and the building accepted so far as that price could be applied, and it follows, as well, that the subsequent payments made by the defendant were paid on account of extras. It is no answer to this, that the defendant Coe paid $1,000 to finish the building, because there was due to Naylor a large amount of money for extra work before he left the building, and the money so expended was to complete the extra work. At least, on the evidence, such a presumption is warranted. There is no language used by the witnesses for the defence to the effect that the $1,000 was expended in finishing the building according to the contract, and it seems clear to me that no such statement could be made. This case considered thus, and presenting these varied aspects, it is my opinion that the judgment of the special term should not be disturbed. The plaintiff had made out a *prima facie* case, and although there are objections to the testimony of Naylor, I cannot say, on a consideration of the whole case, that his testimony should be discarded.

HILTON, J., (dissenting).—Naylor agreed, by his contract of May 28th, 1857, to erect a building for Coe at the corner of East and Cherry streets, in this city, according to certain plans and specifications referred to, and which he says were given him at the time, (but were, however, never signed), for the price of $14,000, payable as follows: $9,000 to be paid to sellers of the materials to be used, as the same should be delivered upon the ground, and a receipted bill handed over. The remaining $5,000 when the whole building was finished in every respect, and the same ascertained to be free from claims of any kind for labor or materials; and to be paid by conveying the store No. 14 Moore street to Naylor, subject to a mortgage for $3,850. By a subsequent agreement between the parties, bearing date July 7, 1857, an additional story was to be put on the building, to be finished under the directions of Coe, for the sum of $5,500, "(making the whole cost of the building, when completed, $19,500,) payable as follows: When the materials are placed on the ground $2,750, and when the roof is on and tinned, the rest, or $2,750." By

the first contract, it was expressly agreed on the part of Naylor, to make any alterations that might be suggested to him, (provided the additional expense of them did not exceed $300), and he was to finish the buildings under the directions of Coe.

Under these contracts the buildings were commenced, and during their progress—under the superintendence of Coe—they were materially altered from the contract or specifications, and although there never was anything said about extra work, or whether the alterations caused any additional expense in their making, the work was proceeded with by Naylor, until Coe had paid out on account of it, in cash, more than the whole contract price. At this time, which was about the 1st of September, 1857 (and during the first week of that month), the parties had a conversation, wherein Naylor stated that, if Coe would pay $22,500, it should be in full of all demands for the building and extra work. By the receipt which Naylor gave about this time, it appears that there had been paid him by Coe, prior to August 17, 1857, $19,500, in full settlement for building the store in question, as per contract; and from Naylor's testimony, there is no doubt that he was paid, in all, $23,642, before he abandoned the building, which was about the 15th of September, 1857, when it was in an unfinished state; and after which the defendant Coe expended about $2,000 in its completion. Subsequent to this abandonment, and after Naylor had been paid not only the contract price agreed on, but also, and in addition, a greater sum than he had agreed to accept in full satisfaction of the contract price and for all extra work performed by him, the plaintiff filed notice of the lien which he now seeks to enforce against the defendant Coe, as owner of the building, for the value of certain materials furnished and used in its construction.

I do not understand how such a claim can be maintained. We have repeatedly held, and such no doubt is the true interpretation of the mechanics' lien law, that in order to sustain the lien it must be made to appear affirmatively that at the time of filing the notice there was actually due or owing from the owner to the contractor, upon the original contract, a greater sum than the

amount for which the lien is claimed. *Doughty* v. *Devlin*, 1 E. D. Smith, 625; *Cronk* v. *Whittaker*, id. 647. And if it appears that the contractor is not entitled to recover upon his contract, by reason of his having abandoned the work before its completion, or that the work has not been performed in accordance with the contract made with the owner; or if it appears that the owner has paid or settled with the contractor before the notice of lien is filed, the lien creditor cannot maintain his action. *Allen* v. *Carman*, 1 E. D. Smith, 692; *Cunningham* v. *Jones*, 3 id. 650.

In other words, the lien creditor, by filing his notice of lien, succeeds only to the rights and claims which at the time is possessed by the original contractor, and to no other or greater; consequently, unless a state of facts is shown which, in a proper action, would entitle the original contractor to recover from the owner, the lien creditor cannot recover. *Cunningham* v. *Jones*, *supra*. It is probable, however, that if the owner and contractor should collude together, and agree upon a settlement in respect to the contract price, or the extra work connected with the contract, for the purpose of depriving parties, who may have contributed their labor or materials to the erection of the building, of the lien which the statute intends to secure to them, the court would be disposed to disregard any settlement which appeared to have been made for such a purpose; and in determining as to the intent of the parties, evidence showing that the value of the extra work performed was grossly disproportionate to the amount allowed for it on the settlement, might not only raise the presumption that the settlement was fraudulent in respect to lien creditors, but would, unexplained, afford strong ground for declaring it to be so in fact. *Lynch* v. *Cashman*, 3 E. D. Smith, 660; *Quimby* v. *Sloan*, 2 id. 594.

As to the settlement, in this case, having been made as shown by the receipt, there can be no doubt. It stands in no way contradicted. But whether the conversation referred to actually took place, is not so certain, as Naylor positively denies it. However, the weight of the evidence is, in my opinion, so clearly against him on this point, that it may be assumed, in the absence

of any finding, by the judge who tried the cause, to the contrary, as a fact proven in the case. This being so, it seems to me clear that Naylor had no claim against Coe for the erection of the building at the time the plaintiff filed his notice of lien, on September 24, 1857, nor was any money then due him on the contract.

If it be said that the amount allowed for the extra work was disproportionate to its value, where, I ask, is the evidence upon this point? I am aware that the witnesses Griffith and Frye testify to the value of the carpenters' and masons' work in the building being $29,529, but they do not state what part of this value is made up of extra work not contained in or called for by the contract, or what has been added to the value by Coe since Naylor abandoned the work. And even if it were conceded that there had been no such conversation and settlement as alleged, in respect to the extra work, there is no evidence which would justify us in presuming that there is anything owing by Coe to Naylor on account of it; and this being so, I am of opinion that the plaintiff has failed to establish any indebtedness from Coe to Naylor at the time of filing the notice of lien.

But, to go further, I think the evidence establishes, beyond a question, that Naylor abandoned the building and his contract before it was completed; and it cannot be denied that his right to compensation for the extra work is to be determined, in some degree, by the contract to which it was an addition. By that contract he was entitled to no compensation until the work specified in it was entirely performed, and there being no proof that the defendant Coe agreed to accept the building in the unfinished state in which Naylor left it, or that he waived further performance by Naylor of his contract, it is quite clear that Naylor could maintain no action upon the contract, and as the plaintiff, as lien creditor, succeeds only to the rights of the original contractor, it follows that he cannot. *White* v. *Hewett*, 1 E. D. Smith, 395; *Neville* v. *Frost*, 2 id. 62; *Cunningham* v. *Jones*, *supra*; *Pullman* v. *Corning*, 5 Selden, 93.

Judgment affirmed.

MARIA WINTERSON AND SAMUEL S. WINTERSON *v.* THE EIGHTH AVENUE RAILROAD COMPANY.

A complaint is sufficient if an averment of a good cause of action can be gathered from it.

The only objections that can be taken to a complaint at the trial are, that it does not show a cause of action, or that the court has not jurisdiction of the case.

Where the case made upon appeal does not contain the charge of the judge at the trial, and does not show that any exception was taken to the charge made, it will be assumed that the questions of fact involved were fully submitted to the jury, with all proper instructions.

In an action against a railroad company for injuries caused by the act of one of their conductors, the complaint, after stating the manner in which the injury occurred, alleged that the conductor acted negligently, and also that by his wilfulness and gross neglect he caused the injury. *Held*,

I. That if the complaint was bad for duplicity, the defect could only be taken advantage of by a demurrer.

II. Such a defect constitutes no ground for a non-suit at the trial.

A principal is not liable for injuries arising from the wilful act of his servant.

APPEAL by the defendants from a judgment entered at special term upon a verdict of a jury in favor of the plaintiffs. The action was brought to recover for injuries received by the plaintiff Maria, while attempting to get on a passenger car of the defendants. The complaint alleged that the conductor of the car, while standing on the platform, saw the plaintiff Maria approach to get on, and while she was getting on he gave the signal to start the car; the car did start before she had time to gain the platform, and she was by this sudden movement thrown off upon the street pavement, and seriously injured. To this statement was added, "that the conductor of said car acted in a negligent and culpable manner, as aforesaid, and he, by his wilfulness and gross neglect, caused the plaintiff to fall, as aforesaid, and receive her said several injuries; and she alleges that the defendants are guilty of carelessness and negligence in having in their employ and service such careless and negligent servants. She alleges that she was attempting to get upon said car when the same was

at rest, and in presence and view of the said conductor, and she was using care and caution at the time, and the said conductor was guilty of gross and wilful negligence and carelessness." The defendants, by their answer, denied all the allegations in the complaint.

Upon the case coming on for trial, and before any testimony was introduced, the defendants' counsel moved that the complaint be dismissed on the ground that it did not state facts sufficient to constitute a cause of action against the defendants, for the reason that, as appeared by the complaint, the act complained of was charged to be the wilful act of the conductor of the car of the defendants, and that there was nothing stated or charged therein, whereby the defendants became or were responsible for the wilful misconduct of the conductor. The motion was denied by the court, and the defendants' counsel excepted. The plaintiffs then consented to strike out that part of the complaint that alleged that the carelessness was wilful, and only claimed for carelessness and negligence.

The trial thereupon proceeded, and the testimony offered was conflicting in respect to the manner in which the injury occurred, the witnesses for the plaintiffs testifying substantially as alleged in the complaint, and the conductor, who was sworn for the defendants, testifying to a state of facts which, if uncontradicted, would absolve the defendants from all blame. The case made upon the appeal, after giving the testimony of the several witnesses in full, concluded as follows:

"The jury, under a charge from the judge, retired, and afterwards came into court with a verdict for the plaintiffs, and assessed their damages at five hundred dollars, upon which a judgment was entered."

Hamilton W. Robinson and Henry Sacia, for the appellants.

I. The record shows, by positive allegation, that the wilful misconduct of the conductor was the cause of the plaintiff's falling and subsequent injuries, and the proof introduced by the plaintiff maintained the allegation, and the motion to dismiss the

complaint ought to have been granted; for the defendants were not liable for such an act, unless they actually directed it. *Tifft* v. *Tifft*, 4 Den. 175; *Bowcher* v. *Noldstrom*, 1 Taunt. 570; *Richmond T. Co.* v. *Vanderbilt*, 2 Comst. 479; *Wright* v. *Wilson*, 19 Wend. 343. 1. From these premises, the only possible form of action against the company would be trespass, with an additional charge showing their direct authorization of the wrongful act. *Foster* v. *The Essex Bank*, 17 Mass. 509; *McManus* v. *Cricket*, 1 East. 106; *Moreley* v. *Gaisford*, 2 H. Blac. 442; 6 Term R. 125; 5 id. 125. 2. If the complaint is equivocal as to the cause of the injury, the construction should be against the plaintiff, but it charges the conductor's wilfulness as a distinct cause of it. 1 Chit. Pl. 241. 3. As a judgment contrary to a mere admission in pleading, is erroneous, much more so is one based upon an allegation positively made and verified by oath. *Bridge* v. *Payson*, 5 Sandf. 210–217. 4. The plaintiff is not aided by the allegation of negligence in having such servants, without an averment of a *scienter;* but no evidence of incompetency was offered. *Van Luven* v. *Lyke*, 1 Comst. 515; 2 Stark Ev. (6 Am. ed.) 525.

II. The motion for a non-suit should have been granted, because the evidence was consistent with the complaint, in charging the injury as having been caused by the wilfulness of the conductor, and it showed no negligence whatever upon the part of the defendants or their agent.

III. The conductor's testimony showed that the plaintiff contributed to the injury, by carelessly trying to get on a car in motion, which is negligence, in law, on her part. *Haring* v. *N. Y. and E. RR. Co.*, 13 Barb. 9; *Brooks* v. *N. F. RR. Co.*, 25 Barb. 600; Mo. Law. R. (Nov., 1852) 407.

IV. The proximate cause of the injury was that the conductor, either wilfully (and contrary to his manifest duty) refused to allow her upon the car, or because she approached it too late to do so consistently with safety. Broom's Leg. Max. 104; 11 John. R. 15.

V. The finding of the jury was contrary to the disinterested

testimony of Cochran, and upon the plaintiff's plea and proof he alone is liable. A new trial should therefore be granted. 13 Barb. 12.

Charles S. Spencer and A. Sandford, for the respondents.

I. The complaint charges the injury to have occurred through the negligence of the defendants. 1st. The words wilful and wilfulness are surplusage. 2d. They characterize the negligence.

II. In one part of the complaint only negligence is charged.

III. The complaint was and is amendable.

IV. The company are liable for the forcible and wrong acts of their agents, acting within the scope of their authority, as when they by force put off a passenger from cars, without right.

V. The judge charged the jury in accordance with the defendants' notion of the law, as no exception is taken to the charge; and a doubt as to the evidence is no ground for disturbing the verdict. *Stroud* v. *Fuller*, 11 Barb. 300.

By the Court, DALY, First Judge.—The complaint recites the particular facts from which the injury proceeded, namely: that while the car was standing to receive passengers, the plaintiff, Maria Winterson, approached it and stepped with one foot upon the step of the car, and took hold of the railing with one hand, intending to get on the car; when the conductor, who was standing on the platform, and saw her attempting to get on, gave the signal for the car to start, at the same time saying to her, "you are too late," and before she had time to get on the platform, that she was thrown off, and fell upon her face and breast, receiving a serious injury. This statement is followed by an averment that the conductor acted in a negligent and culpable manner *as aforesaid*, and by his *wilfulness* and *gross neglect* caused the plaintiff to fall, and that he was guilty of gross and wilful negligence and carelessness. The latter part of the averment may be rejected, and the recital of the facts constituting the cause of action, coupled with the averment that the conductor acted in a negligent and culpa-

ble manner, and that the defendants were guilty of carelessness and negligence in having such careless and negligent servants, is an explicit and sufficient averment of a cause of action, proceeding from the negligence of the defendants. If the complaint relied alone upon the averment of a cause of action arising from the wilful act of the conductor, then it would show that the action should have been against him and not against the company, and it would have been the duty of the judge to have granted the motion for a non-suit; but as the acts of the conductor are set forth, and he is averred to have acted negligently, all the averments setting up wilfulness on his part may be disregarded, and a good cause of action will remain. It is sufficient if an averment of a good cause of action against the defendants can be collected from the complaint. If the complaint is double in setting up a cause of action against the servant of the defendants, growing out of his wilful act, and one against the defendants for the servant's negligence, arising out of the same transaction; then the defendants should have demurred upon the ground that two causes of action had been improperly joined, (*Maxwell* v. *Farnham*, 7 How. 236; *Cook* v. *Chase*, 3 Duer, 643), and the plaintiff would have been compelled to elect. Not having availed themselves of this, which was their proper remedy if the complaint was bad for duplicity, they were not entitled to a nonsuit at the trial upon that ground. The only objection they could take to the complaint at the trial would be, that a cause of action could not be collected from it, or that the court had not jurisdiction.

Treating the complaint as averring a good cause of action arising from the negligence of the defendants' servant, it remains but to consider whether the proof upon the trial showed that the injury was caused by a wilful act of the conductor, or was simply the result of his negligence, and upon that point it is sufficient to say that the question was one eminently fit for the jury, and as the charge of the judge is not given, and was not objected to, we must assume that it was fully submitted to them with all due and proper instruction. It is sufficient for us to say that it does

not appear as matter of law upon the evidence that the conductor acted wilfully; that is, with a deliberate intention to injure Mrs. Winterson, or exhibited that reckless disregard of the life or person of another which is equivalent, or amounts to the same thing, and for which he alone and not the company would have to answer. His own evidence is conclusive upon that point, for the transaction as narrated by him is to the effect that he was entirely without blame; that the injury was caused by the act of Mrs. Winterson alone, to which he in no way contributed by his negligence or otherwise; in which he was contradicted by the plaintiff's witnesses, Mr. and Mrs. Gay. One of these witnesses testified that he pushed her, but as the witness afterwards stated what he did, that is, touched her with his hand upon her back while she had hold of the rail, and that she fell, which was also the statement of the other witness. If this raised any doubt as to the nature of the act that caused the injury; that is, as to whether it was wilfully done or not, it was a question for the consideration of the jury, and as they have passed upon it, the judgment must be affirmed.

Judgment affirmed.

EDWARD SCHWERIN *v.* JOHN MILLS.

A verification to an answer in an action in a district court, is sufficient, if it be to the effect that the party, agent, or attorney verifying the pleading believes it to be true.

APPEAL from a judgment rendered in favor of the plaintiff by the First District Court. The return showed that the complaint was verified in the form prescribed by the Code, and a copy thereof had been served with the summons. The defendant put in an answer denying the cause of action alleged, and added to it a verification, by himself, in the following words: "The defendant, being duly sworn, says that he believes the following

answer to be true." The justice gave judgment for the plaintiff for the amount claimed in the complaint, without requiring any proof; disregarding the answer upon the ground that it was not properly verified. The defendant appealed.

Charles Fraser, for the appellant.

Henry T. Cleveland, for the respondent.

By the Court, BRADY, J.—The question presented by this appeal is whether the verification of an answer in the following form, "the defendant, being duly sworn, says that he believes the foregoing answer to be true," is sufficient under the 15th section of the "Act to reduce the several acts relating to the District Courts in the city of New York into one act," passed April 13, 1857. That part of the section which relates to this subject is as follows: "When a copy of the complaint is served as specified in this section, the original complaint and the answer thereto must be verified by the oath of the party pleading, or if he be not present, by the oath of his agent or attorney, to the effect that he believes it to be true." The doubt arising upon the language of the section is suggested by the questions: Who believes it to be true? The party or his agent? And if it apply only to the agent, in what manner must it be verified by the party?

It was insisted, upon the argument, that the statute should be construed to mean that the answer must be verified by the oath of the party, *and in the manner prescribed by law.* Assuming this to be a proper view, we are met at once by another difficulty, which is, that there is no form of verification by law established relating to pleadings in the district courts. The provisions of the Code relate to pleadings in courts of record exclusively. Beside that, the construction suggested would, if adopted, embody that part of the Code which applies to the verification of a pleading by the party, and not that which relates to the verification by an agent or attorney.

From the language of the statute, it seems to have been the intention of the legislature to require only a verification *to the effect* that the person making it believed the pleading to be true, and without reference to the form or language in which the verification was made. The object to be accomplished was to put the party sought to be charged to his oath, denying the alleged claim, or in setting up a defence if the claim could not be gainsaid. The statute certainly has not, in express terms, given any form of oath to be made by the party, if, by construction, the words "to the effect that he believes it to be true," are held not to apply to him, but if the converse be the construction, then the form of the verification is the same, whether made by the party or the attorney. The statute thus considered as presenting a doubt, must be controlled by the rule which has always been applied to these courts and their jurisdiction. They are creatures of the statute, and take nothing by implication. What is given to them in express terms only can be exercised as a power, and as the provisions of the Code relating to the verification of pleadings are not made applicable to them, those of the act of 1857 alone apply. That at § 15 treats of the whole subject, and provides in terms, that when a complaint is verified, the answer must be also verified to the effect that the person verifying believes it to be true. This provision is simple, and in my judgment, sufficiently comprehensive to cover allegations in the pleading founded upon knowledge or asserted on information. These courts were originally designed for the prosecution of small claims, and are yet the only tribunals in this city in which such demands may be prosecuted. Their jurisdiction has been enlarged and their form of procedure magnified by recent legislation, but it cannot be said with propriety that the legislature intended to surround them with the formulas and insignia of courts of record, and to require the litigants therein to conform to them. When a provision of law relating to these courts, where simplicity in forms should prevail, is framed so ambiguously that it is not intelligible to a common understanding, it is the duty of the courts of review to see

that no injustice is done by the exercise of a doubtful authority. I think the only verification of pleadings in the district courts, required by law, is that stated; and that, whether made by agent, or attorney, or party, it is sufficient if it be to the effect that the deponent believes it to be true.

Judgment reversed.

CORNELIUS AND HENRY M. BAKER *v.* ROBERT G. BONESTEEL.

Spurious or counterfeit bank bills, given in discharge of a debt, will not operate as a payment, though both parties at the time suppose them to be genuine.

Testimony showing a good cause of action cannot be disregarded, when it is uncontradicted and is unaccompanied by any suspicious circumstances.

APPEAL from a judgment given by the First District Court in favor of the defendant. The action was brought to recover for coal sold and delivered to the defendant. It appeared at the trial that the defendant had given, in payment for the coal, a bank bill, which, on being sent to the bank for deposit, was discovered to be a counterfeit. It was thereupon tendered to the defendant, and he refused to receive it. The plaintiffs' testimony established conclusively that the bill was spurious, and that it had been received from the defendant in payment for the coal. The defendant was examined on his own behalf, and testified in substance that he had no recollection of paying for the coal in the bill in question, and which was produced at the trial. The evidence on the part of the plaintiffs was thus left uncontradicted, and there were no circumstances appearing in the case tending to discredit it in the slightest degree. The justice gave judgment for the defendant, and the plaintiffs appealed.

Choate & Barnes, for the appellants.

David E. Wheeler, for the respondent.

I. The court should not set aside a judgment given by an inferior tribunal, upon the *only* ground that the judgment is contrary to and against evidence, unless, 1. It appears, from the return of the justice, that in some form he was wrongfully influenced, or unless the case is void of all conflicting evidence, or unless it appears that great injustice would be done: for slight or small pecuniary amounts should not be allowed to occupy the time of courts when the subject matter has been adjudicated, and the only question is that of weighing of testimony. *Easton* v. *Smith*, 1 E. D. Smith, 318; *Mellon* v. *Smith*, 2 E. D. Smith, 462, 472; Graham's Practice, 632; *Douglass* v. *Tousey*, 2 Wend. 252; *Smith* v. *Hicks*, 5 Wend. 550.

II. In this case there is a conflict of testimony, and the justice who heard the oral evidence, has determined the truth from the best possible point. He has seen and heard the witnesses face to face, and the granting a new trial would be merely opinion against opinion. *Needles* v. *Howard*, 4 Maule & Selwin, 192; *Decker* v. *Jaques*, 1 E. D. Smith, 54, 62; *Easton* v. *Smith*, ibid, 80, 83; *Rivara* v. *Ghio*, ibid, 318; *Pozzino* v. *Henderson*, 3 E. D. Smith, 364; *Mellon* v. *Smith*, 2 E. D. Smith, 146; ibid, 462, 472.

III. The testimony of the plaintiff below must be clearly and beyond a doubt over-balancing that of the defendant, and this the return does not show. 2 Strange, 1142; 3 Wilson, 647; 2 Johns. Rep. 70.

IV. This judgment may have been rendered on the credibility of witnesses, and to set it aside, it must be manifestly and palpably against the weight of evidence, and the case must be free from doubt. 12 Wend. 27; 7 Cowen, 202; Graham's Practice, 632; Graham's New Trials, 361; 2 Wendell, ——; *Watkins* v. *Cousall*, 1 E. D. Smith, 65; *McLaughlin* v. *Barnard*, 2 E. D. Smith, 372.

V. The return shows that the plaintiffs entirely failed in their testimony, and should have been non-suited.

By the Court, HILTON, J.—The witness Brant testified that he gave the identical bills received by him from the defendant to

Marin, the clerk of the plaintiffs; and Marin testified that the bill in question was one of those he so received from Brant. This testimony was uncontradicted, and there was no circumstances shown which warranted the justice in disregarding it. *Donohue* v. *Henry*, 4 E. D. Smith, 162. The evidence of Bliss, left no doubt as to the bill being spurious and of no value. It should not, therefore, operate as a payment for the coal shown to have been sold and delivered to the defendant. *Markle* v. *Hatfield*, 2 John. 455; *Thomas* v. *Todd*, 6 Hill, 340.

The finding of the justice was clearly against the evidence. Judgment reversed.

GEORGE W. AND NATHAN C. PLATT *v.* JAMES M. STARK.

Extending the time for the payment of a note, past due, at the request of the maker, and without the consent of an indorser upon it, discharges the indorser from his liability.

P. held a note of G. indorsed by S. After its maturity, and without the consent or knowledge of S., P. accepted from G. a payment in cash on account, and his note for the balance due, payable three months thereafter. *Held*,

I. That P. thereby extended the time for the payment of the original debt, and suspended any right of action upon it, during the period the new note had to run.

II. Such an extension of credit to G. effectually released S. from liability as indorser upon the original note.

APPEAL from a judgment of the Fourth District Court in favor of the plaintiffs. The action was brought against the defendant as indorser of a note made by A. H. Gough, and transferred to the plaintiffs before maturity. It appeared at the trial, that after the note became due they accepted from Gough a payment of $50, in cash, on account, and his note for the balance due, payable in three months, with two corporation leases of lots upon sales for taxes, as security; giving at the time to Gough a writing, acknowledging receipt of the new note and the leases, and releasing

the defendant as indorser upon the note in suit. Gough subsequently delivered this release to the defendant, and at the time procured from him, on the faith of it, certain bank stock which he held as security for his indorsement.

It was claimed by the plaintiffs, that they did not read the writing at the time they signed it, but acted on Gough's representations as to its contents, and which were untrue; also that the release was without consideration, being founded upon the presumed transfer of the corporation leases, when it was in fact shown that one of them was, by an assignment indorsed upon it, transferred to Sarah Gough, and the other transferred in blank. The justice gave judgment for the plaintiffs, and the defendant appealed.

William R. Stafford, for the appellant.

John N. Whiting and John L. Sutherland, for the respondents

By the Court, HILTON, J.—The defendant is sued as an indorser upon a promissory note for $200, made to his order by one A. H. Gough, and now held by the plaintiffs. The note became due in July, 1854, and it appears that in September following the maker paid to George W. Platt, one of the plaintiffs, $50 on account of it; gave his individual note, payable in three months thereafter for the remaining $150; deposited with the plaintiff two corporation leases as security for its payment; and received from him a written instrument acknowledging the receipt of the new note and leases, and releasing the defendant as indorser on the note now sued upon. It is claimed by the plaintiffs that this release is not only void for want of a consideration to support it, but, in addition, that it is invalid because it was obtained upon representations, made by Gough, which induced the plaintiff to sign it, without reading to ascertain its contents or effect.

As it is not disputed, that after the note in suit became due, the plaintiff accepted the new note from the maker without the

consent or knowledge of the indorser, it is quite immaterial to inquire whether or not the release was invalid upon either of the grounds suggested.

The effect of accepting the new note was to extend the time for the payment of the original indebtedness; it entirely suspended the plaintiffs' right of action during the period it had to run, and the defendant was, by this extension of credit to the maker, as effectually released from any liability as indorser upon the note in suit, as he would have been by a novation to which he was not a party. *Myers* v. *Wells*, 5 Hill, 463; *Colemard* v. *Lamb*, 15 Wend. 329, 332; *Nexsen* v. *Lyell*, 5 Hill, 466; *Fellows* v. *Prentiss*, 3 Denio, 512, 518; *Coleman* v. *Wade*, 2 Selden, 44; *Wood* v. *Jefferson Co. Bank*, 9 Cow. 194, 206; *Putnam* v. *Lewis*, 8 John. 389; *Hart* v. *Hudson*, 6 Duer, 294, 304.

The plaintiffs were not entitled to recover, and the judgment of the justice in their favor was erroneous.

Judgment reversed.

GILMAN GOODWIN *v.* JAMES B. KIRKER.

Where one party to a contract terminates it by refusing to fulfill it, and gives notice to that effect, the remedy of the other party is by an action to recover the value of any work already done, with such damages in addition as may be shown to have resulted from the breach of the agreement.

K. employed G. to shore up a wall of a building in a particular manner, and at a specified price; but before the work had been half performed, not being satisfied with the manner in which it was being done, he notified G. not to proceed further with it. G., notwithstanding, completed the shoring up, and then sued upon the contract to recover the price agreed on. *Held*,

I. That giving the notice put an end to K.'s liability upon the contract for any work subsequently performed under it.

II. That G. could only recover for the value of the work done previous to the notice, with such damages as arose from the refusal of K. to fulfill his agreement.

APPEAL from a judgment of the Third District Court. The

action was brought to recover the contract price agreed upon for shoring up in a particular manner a wall of the defendant's building. It appeared at the trial that the plaintiff was employed by one Woodruff to erect a building on a lot on Broadway, adjoining the plaintiff's store, and a part of that employment was to shore up the wall in question, which Woodruff was obligated to do by the "Act respecting excavations in New York and Brooklyn," passed January 24th, 1855. (See Laws 1855, p. 11.) The plaintiff commenced this work, and was about inserting the needles to support the wall upon the floor of the defendant's store. On being requested to place them in the cellar underneath, so as not to interrupt the defendant's business, he declined, upon the ground that it would be a more expensive way. The extra cost being inquired, it was stated to be $50, which the defendant agreed to pay. Afterwards, the needles not being put in the place where the defendant understood they were to be, he rescinded the contract and notified the plaintiff not to proceed under it. When the shoring up had been completed, this action was brought upon the contract thus agreed on, the plaintiff claiming that he had performed it, and the defendant insisting that he had not. The testimony before the justice was conflicting upon this point, but it was not disputed that the notice was given before the work was completed. During the trial the defendant put in evidence the contract made originally with Woodruff, and the plaintiff excepted to its admission. The justice gave judgment in the defendant's favor, and the plaintiff appealed.

Alexander Spaulding, for the appellant.

Robert C. Embree, for the respondent.

By the Court, HILTON, J.—This action is upon a parol contract made between the parties in respect to shoring up the walls of a building owned by the defendant. The defence is that no work was performed under the contract; and also, that before

any work was attempted, the defendant rescinded the contract, and notified the plaintiff not to proceed under it. On the trial before the justice, the evidence was conflicting as to whether the plaintiff did the work thus contracted for, and his finding upon this question cannot be disturbed.

Upon the question as to whether any work had been performed by the plaintiff at the time the defendant notified him not to proceed, the plaintiff testified that nearly half of the work had been done before the notice was given; while, on the contrary, the defendant testified that the work had not then begun.

Evidence of this nature was clearly insufficient to support the plaintiff's action upon the *contract*. The notice thus given put an end to the defendant's liability upon the contract for any work subsequently performed under it, and left the plaintiff to his action for the value of any work he had previously performed; and for such damages, in addition, as he might show to have resulted from the defendant's breach of the agreement. 2 Parsons on Contracts, 193. *DuBois* v. *The Delaware and Hudson Canal Co.*, 4 Wend. 285; *Masterton* v. *The Mayor, &c., of Brooklyn*, 7 Hill, 61. This is not such an action; and if it was, the testimony at the trial showed no ground upon which the plaintiff could recover.

The evidence respecting the contract for shoring up, made between the plaintiff and Woodruff, although not very material, yet, it seems to me, was properly admitted for the purpose of showing the nature of the contract upon which was engrafted the parol agreement constituting the ground of the present action.

Judgment affirmed.

JOHN MCGRAW *v.* GIDEON L. WALKER.

A justice cannot, of his own knowledge, certify to the time when an action was commenced before him by the delivery of the summons for service.

When that fact is necessary to be shown, it must appear by competent evidence.

In the absence of any proof, before the justice, of the time of the commencement of an action before him, it will be deemed commenced on the day the summons was actually served.

In computing the time within which an action must be commenced upon a note, the day on which the right of action accrued should be excluded.

A note became due October 4, 1852, and an action upon it was commenced October 5, 1858. *Held*, that the right of action accrued on October 5, 1852, and, excluding that day from the computation, the suit was brought within the six years limited by statute.

APPEAL from a judgment of the First District Court in favor of the plaintiff. The suit was brought upon a promissory note for $33, made by the defendant July 2, 1852, payable to Phineas Morse or bearer on the first day of October (then) next. The answer set up that the cause of action did not accrue within six years previous to the commencement of the action. The justice, in his return, stated that "this action was commenced by a summons issued out of this court by the clerk thereof, on the second day of October, 1858," &c., but it did not appear that any evidence upon this point was given before the justice at the trial. There was, however, attached to the return a certified copy of the summons, with the certificate thereon of a constable, showing that it was actually served on the defendant on October 5, 1858. The defendant appealed.

Gideon L. Walker, appellant, *in person.*

Stephen B. Cushing, for the respondent.

By the Court, HILTON, J.—The only question presented for determination upon this appeal is, whether the action before the justice was commenced within the period limited by statute.

Although the justice returns that the action was commenced

on October 2, 1858, by a summons issued out of his court by the clerk thereof, yet that fact was not proved before him, nor does it appear from the evidence when the summons was actually delivered for service. District Court Act 1857, § 22. In the absence of proof showing when the summons was issued or actually delivered for service, the day of its service, which was October 5, 1858, must be deemed by us the time when the action was commenced. *Cornell* v. *Moulton*, 3 Denio, 12.

The action was upon a negotiable promissory note made by the defendant, dated July 2, 1852, payable on the first of October then next, and, being entitled to days of grace, the defendant had the whole of the three following days in which to pay it. He could not have been sued upon it until the 5th of October, and on that day, therefore, the cause of action accrued. *Osborn* v. *Monsure*, 3 Wend. 170; Edwards on Bills and Notes, 527; *Hogan* v. *Cuyler*, 8 Cowen, 203. The Code of Procedure has limited the time within which an action of this nature can be commenced, and has also declared the manner in which that time shall be computed. By Title II, (§ 74), civil actions can only be commenced within the periods in that title prescribed "after the cause of action shall have accrued," and by sections 89 and 91 of the same title, this period, in actions upon contracts, is prescribed to be "within six years." By § 407, the time within which an act is to be done, as in the Code provided, shall be computed by excluding the first day and including the last.

The rule thus declared, in respect to the computation of time in a statute, had been previously settled by a number of decisions in this state, several of which are cited in *Cornell* v. *Moulton*, (*supra*). Applying it to the present case excludes the day on which the right of action accrued upon the note, namely, October 5, 1852, and includes that on which the summons was served on the defendant, namely, October 5, 1858. The action having therefore been commenced within the period prescribed, it follows that the judgment of the justice was right, and should be affirmed.

Judgment affirmed.

SMITH ELY *v.* GEORGE COOK, JOHN SHERWOOD AND ROBERT H. SHERWOOD.

Where the right of the plaintiff to maintain his action depends upon a judgment docketed in his favor, but on his producing the judgment record to the court it appears that the judgment is void by reason of having been entered by confession, upon an insufficient statement of indebtedness; the action will be dismissed.

Although a defendant will not be permitted to avail himself of a defence not stated in his answer, yet, if a plaintiff voluntarily shows that he has no cause of action, the court will not assist him, or grant him any relief.

A judgment by confession was entered upon the following statement of indebtedness: 1st. The sum of $1,500, for cash borrowed from time to time, for which the plaintiff holds the defendant's note. 2d. That the plaintiff had assumed for the defendant the payment of $2,000, for which he had given the plaintiff two notes. *Held*, that this was not a concise statement of the facts out of which the indebtedness arose, and therefore it did not authorize the entry of a judgment upon it.

A judgment thus entered, however, is conclusive and valid against the party making the confession. Per DALY, First Judge.

An action cannot be maintained by a judgment creditor for the purpose of setting aside an insolvent discharge granted to the debtor, upon the ground that the officer granting the discharge never acquired jurisdiction of the proceeding, and that such want of jurisdiction appears on the face of the record.

During the progress of an action against an insolvent, he agreed with his attorneys that the costs which might be recovered in the suit should belong to them. He subsequently prevailed in the action, and had a judgment for costs, which he assigned to the attorneys; *Held*,

I. That such an assignment was valid.

II. That the judgment belonged to the attorneys, and was not the subject of a set-off against a judgment of the plaintiff, previously recovered against the insolvent.

APPEAL from a judgment entered at special term, in favor of the defendants Sherwood and against the defendant Cook, declaring his discharge, as an insolvent debtor, void. The action was brought by the plaintiff to set off a judgment by confession, recovered by him against the defendant Cook, against a judgment for costs recovered by Cook against the plaintiff, and also to set aside an insolvent discharge granted to the defendant

Cook subsequent to the judgment so entered against him, but prior to the judgment entered in his favor.

It appeared that the judgment in favor of the plaintiff, and under which he claimed, was entered upon a confession of the defendant Cook, that he was indebted to the plaintiff: First, In the sum of $1,500, for cash borrowed of the plaintiff from time to time, and for which he held Cook's note, dated November 12, 1850, payable six months after date. Second, That the plaintiff had assumed for Cook the payment of $2,000, for which he had given the plaintiff two notes, for $1,000 each, payable at sixty and ninety days.

After this judgment Cook made a voluntary assignment of his property to Foot and Gross, for the benefit of his creditors, and in an action brought by Ely to set aside this assignment, a judgment for costs was given in favor of the defendant Cook, and in such judgment there was "reserved to the plaintiff (Ely) the liberty to off-set the costs awarded to Cook on the judgment of Ely against him." In this action the defendants Sherwood were attorneys and counsel for Cook, and during its progress it was agreed between them that the costs to be recovered should belong to the Sherwoods, as such attorneys.

The judgment in favor of Ely was for the sum of $3,555, and was entered in the Supreme Court on November 29th, 1850. The judgment in favor of Cook was for $382.42, was entered in the same court on October 29th, 1856, and was subsequently assigned to the Sherwoods; and the insolvent discharge of Cook was granted by the recorder of the city of New York, on December 31st, 1851.

On the trial, at special term, the plaintiff put in evidence the record of the judgment by confession against Cook, although the defendants did not, in their answers, deny its validity, or that it had been recovered. Judge BRADY, before whom the trial was had, found as a fact that an agreement had been made between the Sherwoods and Cook, as above stated, and gave judgment in favor of the Sherwoods; but as the proceedings upon the insolvent discharge of Cook showed a want of jurisdiction

in the officer who granted it, judgment was given against Cook, declaring such discharge void.

The reasons for this determination were stated in the following opinion:

BRADY, J.—The Code (§ 303) repeals all existing laws restricting or controlling the right of a party to agree with an attorney, solicitor or counsel, for his compensation, and hence it follows that though prior to the enactment referred to an agreement with an attorney to give him part of a debt for collecting it was void, (*Sutterlee* v. *Frazer*, 2 Sand. S. C. R. 141, and cases cited), it is not so now. In the language of SANDFORD, J., in the case just mentioned, "the Code of Procedure appears to have changed the law in this respect, and enables parties to make such bargains as they please with their attorneys." See also *Easton* v. *Smith*, 1 E. D. Smith R. 318. It is true that, at the time the agreement was made by the Sherwoods with Cook, no costs had accrued, and from the nature of the action brought against the latter, costs might not have been granted had he succeeded, but that did not affect the right of Cook to bargain upon the hypothesis that he might recover costs. That doubt was a matter affecting only the employer and the employed, which third persons had no power to interfere with. Having the right to make the agreement, and the agreement not being against the policy of the law, it was binding upon the parties, and must be sustained. From the moment the Sherwoods began to defend the action against Cook, an equity in their favor commenced, and so continued down to the time when the costs were adjusted. They labored for those costs, and having succeeded in the defence, it must be assumed that they earned them by diligence, industry and skill. They took the risk in reference to the costs, and having done so, the costs never in fact belonged to the defendant in the action. Prior to the Code the courts would not refuse to set off one judgment against another because of the attorney's lien; upon the ground, that the equities of the parties were superior to those of the attorneys, the attorney looking in the first instance to the

personal security of his client, (*The People ex rel. Manning* v. *The N. Y. Com. Pleas*, 13 Wend. 649; *Nicoll* v. *Nicoll*, 16 Wend. 446); but without reference to the question whether the attorney's lien still exists, although it seems to be settled, (*Ward* v. *Woodsworth*, 1 E. D. Smith's R. 598; 12 How. Pr. Rep. 136; 11 How. 100; 20 Barb. 541; 21 Barb. 17; 4 Barb. 47), there is little doubt that the principle upon which courts heretofore permitted judgments to be set off must still prevail, even if the lien is held to continue. In this case, however, something more than a mere lien exists. The costs that might be awarded were passed to the Sherwoods in anticipation of their recovery, as a compensation for their services which would result in that recovery, and as each particular service for which costs were allowed was performed, the right of the Sherwoods to the compensation for that service attached, not by lien alone, but by express agreement. Cook said, at or about the time that the agreement was made, that he had no means to carry on the suit, that he had failed, made an assignment, and had gone through the Insolvent Act. It would seem, from these circumstances, that the Sherwoods looked first to the costs for security, and not to the personal responsibility of Cook, who had declared himself to be irresponsible, and it follows that, so far as the cases *supra* are founded upon the theory that the attorney relies first upon his client for payment, they have no application to this case. For these reasons, I think the defendants Sherwood entitled to judgment. The plaintiff is, however, entitled to judgment against the defendant Cook. The discharge granted by Recorder Talmadge is only *prima facie* evidence of the jurisdictional facts recited, and those facts may be inquired into by a party seeking to impeach the final order in a collateral action. If a defect is ascertained, the whole proceeding is void. *Stanton* v. *Ellis*, 2 Kern. 575. In applications by an insolvent and his creditors, under the third article of the title of the Revised Statutes relating to non-resident, absconding, insolvent, and imprisoned debtors, (2 R. S. 16), the debtor is required to annex an affidavit to his petition, account and inventory, in the form prescribed by the statute, which shall be

subscribed by the insolvent, and sworn to in the presence of the officer to whom the petition is presented, and the officer receiving such petition, schedule and affidavit, shall make an order requiring all the creditors of the insolvent to appear. The affidavit is a prerequisite, and unless made in the manner and at the time prescribed, the officer acquires no jurisdiction. The affidavit relates to the inventory of the debtor's estate among other things, and the whole of which estate the creditors to are entitled as it exists at the time the petition is presented. But were it otherwise, it is sufficient that the statute requires the affidavit to be made before the order to show cause is granted, and in the presence of the officer granting the order. The proof shows that the affidavit referred to was sworn to before a commissioner of deeds in the first instance; that on or after the day on which the order to show cause, granted by the recorder, was returnable, the jurat to the affidavit was signed by him, and that although signed by him, it was neither subscribed nor sworn to by the insolvent in the presence of the recorder. It is clear, therefore, that the recorder never acquired jurisdiction, and that the whole proceeding before him was void.

There may be some question as to the sufficiency of the statement upon which the plaintiff obtained judgment against Cook, so far as the rights of other creditors of the latter may be affected, but as between the plaintiff and Cook it is valid. *Griffin* v. *Mitchell*, 2 Cow. 545; *Van Keller* v. *Muller*, 3 Abb. Pr. R. 375.

Ordered accordingly.

The plaintiff appealed from the judgment in favor of the defendants Sherwood, and the defendant Cook appealed from the judgment against him, declaring his insolvent discharge void.

C. Bainbridge Smith, for the plaintiff.

I. It was well settled before the adoption of the Code of Procedure, that the lien of an attorney for his costs was subordinate to the equities existing between the parties; and that where two parties held judgments against each other, courts, both of law

and equity, were bound by statute to set off the one against the other, notwithstanding the attorney's costs. *The People* v. *Manning*, 13 Wend. 649; *Nicoll* v. *Nicoll*, 16 Wend. 446; *Noxon* v. *Gregory*, 5 How. Pr. 339; *Ward* v. *Wardsworth*, 1 E. D. Smith, 398; *Wilkins* v. *Batterman*, 4 Barb. 47; *Chappell* v. *Dann*, 21 id. 17. 1. The costs belong to the party. Formerly a party not an attorney, conducting a suit or defence in person, was not entitled to costs. Now they are allowed to the prevailing party upon the judgment, by way of indemnity for his expenses in the action, whether he be an attorney or not. *Ex parte Stewart* v. *N. Y. Com. Pleas*, 10 Wend. 597; Code, § 303. 2. There were no costs at common law. They are created by statute; so are set-offs. Beame on Costs, p. 8, (6 L. L., N. S.); 4 Burr, 2221. 3. In any case, they do not exist until judgment; and where the legislature changes the costs during the progress of a suit, the costs of such suit are to be taxed according to the statute in force at its termination. *The Sup'rs. of Onondaga* v. *Briggs*, 3 Denio R. 173. 4. In the action in which the costs in favor of Cook were awarded, they were in the discretion of the court, and the court, in awarding them, reserved to the plaintiff the right to have them set off against his judgment. Code, § 306. 5. The testimony does not support the conclusion arrived at by the judge, that there was an agreement between the defendants that the costs should belong to the attorneys. 6. Conceding the existence of such an agreement, the question is, whether the provisions of the Code allowing an attorney and client to make an agreement between themselves as to the compensation of the attorney, affect and bind third parties, and has repealed the statutory right of set-off, which in such cases heretofore existed.

II. The plaintiff's judgment is good and valid. 1. The validity of the judgment was not brought in issue, and was admitted by the pleadings. 2. A "defendant is required, besides answering the plaintiff's case, to state to the court, in his answer, all the circumstances of which he intends to avail himself by way of defence; and he cannot avail himself of any matter of defence which is not stated in his answer, even though it should appear

[illegible] Hill, [illegible] 2 Comst. 500; *Field* v. *The Mayor, &c.* 2 Seld. 179; *Ex parte* Bell, 3 N. Y. R. (3 Smith) 297. 3. The specification is sufficiently particular to apprise all persons of the nature and the amount of the debt. Code, § 389; *Mandeville* v. *Reynolds*, 68 N. Y. R. 528; *Delamere* v. *Ensign*, 21 Barb. 81; *Chipp* v. *Chipp*, 1 Kern. 228; *Dunham* v. *Waterbury*, 17 N. Y. R. [illegible]; *Smith* v. *Everett* were void as to creditors, are good as between the parties. *Griffin* v. *Mitchell*, 2 Cow. R. 561; *Van Keuren* v. *Morris*, 3 Abb. P. R. 375.

III. The insolvent [illegible] on the 21st day of December, 1851, after the plaintiff's judgment against him was recovered, obtained a discharge under what is commonly called the Two Third Act. It appears by the proceedings that the officer who granted the discharge, [illegible] not acquire jurisdiction therein: and, consequently, so far as the plaintiff's judgment is sought to be affected by the discharge, it is the same as if it had never been granted.

It was clearly proved, in addition to the admission in the pleadings, that the affidavit required by the seventh section of the act, upon which the officer acquires jurisdiction in such proceedings, was neither sworn to nor subscribed by the insolvent in the presence of the recorder who granted the discharge, until the order requiring the creditors to show cause why the insolvent should not be discharged from his debts was returnable. 2 R. S., p. 16. 1. The seventh section requires the affidavit to be "sworn to and subscribed by such insolvent in the presence of such officer, who shall certify the same." 2 R. S., p. 17, sec. 7. 2. The officer before whom insolvent proceedings of this nature are conducted, exercises a special jurisdiction acquired in the mode prescribed by the statute, and if any essential requisite is wanting, his acts are a nullity. *Small* v. *Wheaton*, 2 Abbott's P. R. 178; *Stanton* v. *Ellis*, 2 Kern. R. 575.

IV. The discharge is also void, because there was no proof furnished to the officer granting the same, that the insolvent was a resident of, or imprisoned in the city of New York at the time of the presentation of his petition for such discharge. 1. The

statute requires that applications made under the articles enumerated in that title, "shall be made to an officer residing in the county in which the insolvent or imprisoned debtor resides, or is imprisoned; and *proof* of such residence or imprisonment shall be made at the time of presenting the petition, and before any order shall be granted thereon." 2 R. S., p. 35, § 2. 2. Not only must the insolvent be a resident of the county, *but proof of such residence shall be made* at the time of presenting the petition, and before any order shall be made. *Stanton* v. *Ellis*, 16 Barb. S. C. R. 319; *Small* v. *Wheaton*, 2 Abbott's P. R. 179; *In re Underwood*, 3 Cow. R. 59.

Henry A. Cram, for all the defendants.

I. The agreement between Cook and his attorneys that they should have the costs, was valid. 2 Sand. 141; 1 E. D. Smith, 318.

II. The lien of the attorney for his costs, still exists. The right of set-off of judgments is not superior in equity to that of the attorney. But whether it is so at common law is not here material, because a valid contract is made between the attorney and client before the costs are earned, the consideration of which on one side is the service to be rendered, and on the other the right to the costs. The costs, as soon as earned, became the property of the attorney; and never having been the property of the client, no set-off could or ought to be made of a judgment against the client. This court has, at general term, passed upon and determined this precise question in this action, and it cannot now be considered an open question. *Robbins* v. *Alexander*, 11 Howard P. R. 106.

III. The evidence fully sustains the allegation of the agreement and the finding of the judge, and is not disputed.

IV. The judgment by confession against George Cook is void, because: 1st. The statement necessary to authorize the entry of judgment by confession, without action, is clearly insufficient. The first part of the statement omits to set forth the dates or amounts, or particulars of cash borrowed. The fact that a note

[redacted]

Hunt, J.—I think the judgment in this case, so far as it relates to the defendant Sherwood is right, and should be affirmed; although I do not assent to the conclusion arrived at by *Judge Beardsley*, in respect to the validity of the plaintiff's judgment. It may be that its validity was not denied by the defendants in their answers, but the plaintiff did not choose to rest his case upon the admission which he now insists the answers contain. The judgment under which he claims was entered by the clerk of the Supreme Court upon the confession of the defendant Cook, and the record containing this confession was produced and read in evidence at the trial on the part of the plaintiff, notwithstanding the defendants' objection and their exception to its admission. It thus became evidence in the cause, and the court was therefore bound to inspect it, to determine as to its validity as a record, and as to whether the statement or confession contained in it, was sufficient in law to warrant the clerk in

entering the judgment upon which the plaintiff's right of action depends; because, if it was not sufficient and did not show a concise statement of the facts out of which the indebtedness alleged in it arose, (Code, § 383), it follows that the judgment was entered by the clerk without legal authority; was not merely irregular, but void, (*Chappell* v. *Chappell*, 2 Kernan, 215; *Von Beck* v. *Sherman*, 13 Howard, 472; *Bonnell* v. *Henry*, id. 144), and could, therefore, form no ground for the plaintiff's recovery.

The first item of indebtedness mentioned in the statement is the sum of $1,500, for cash borrowed by the defendant Cook of the plaintiff, from time to time, and for which he holds the defendant's note, dated November 12, 1850, payable six months after date. This was clearly insufficient. It should have specified the several amounts which went to make up the indebtedness, and the different times when the money was loaned. It was so held in *Steblins* v. *The East Society of the Methodist Episcopal Church, Rochester*, 12 Howard, 410.

The second item of indebtedness alleged is still less explicit. It is that the plaintiff had assumed for the defendant Cook the payment of $2,000, for which he had given the plaintiff two notes for $1,000 each, made payable at sixty and ninety days.

This is certainly not "a concise statement of the facts out of which the indebtedness arose." The nature and origin of the indebtedness assumed, to whom it was owing, and in what manner it was assumed by the plaintiff, should have been stated. All this the law required, and as the statement did not furnish such information, it was not such a one as authorized the entry of a judgment upon it.

For these reasons I think the judge at special term erred in finding, as a conclusion of law, that the plaintiff's judgment was good and valid. He should have found it to be the reverse. As to the argument that its validity can only be questioned by a junior judgment creditor, it seems to me inapplicable to a case like the present. The plaintiff sought, in this action, to enforce what he claimed to be a legal right acquired under a judgment entered upon the confession of the defendant Cook. If he re-

covers, it must be upon the strength of his own case and the evidence he has adduced in support of it, and not upon the weakness of his adversary. He attempted to show that he was the owner of a valid judgment, which he was entitled to set off against a judgment actually belonging to the defendants Sherwood. Failing to show this, it follows that he has no cause of action, and, therefore, not entitled to the relief he has demanded. The defendants did not come into court asking to have his judgment vacated or declared void; they simply relied upon the inherent weakness of his claim, and asked that his action be dismissed because he failed to show himself entitled to any relief whatever. This, in my opinion, they had a right to do.

Upon these views the plaintiff was not a judgment creditor of the defendant Cook, and, therefore, was not entitled to have the court declare his insolvent discharge void. In my opinion the judge at special term improperly passed upon that question, and the judgment given in respect to it should be reversed.

BRADY, J., concurred.

DALY, First Judge.—All the defendants in this case were entitled to judgment. The equitable relief which the plaintiff asked was this: That the discharge granted to the defendant Cook, as an insolvent, should be declared void; that the judgment which he, the plaintiff, had obtained against Cook by confession, should be set off against the judgment recovered by Cook against the plaintiff, to the extent of the latter judgment; that the latter judgment should be adjudged to be satisfied and cancelled of record; and that the plaintiff should have judgment for what would remain due upon the former judgment, after allowing the set-off. Two things were sought to be accomplished by the action. First, to get rid of the discharge which stood in the way of the plaintiff's judgment, and then to have the set-off allowed.

The judgment which Cook recovered against the plaintiff was exclusively for costs. The action was brought by the plaintiff

against Cook and others, to set aside an assignment which Cook had made for the benefit of creditors, and the plaintiff having failed in the action, Cook, as one of the defendants, recovered judgment against him for $382.42 costs. Upon the trial, in this suit, it was proved that after the commencement of that action, and before an answer was put in, an arrangement was made between Cook and his attorneys, the Messrs. Sherwood, to the effect that the costs of the defence of the action should belong to the attorneys. Mr. John Sherwood swore that Cook came to them, the attorneys, and told them that he had no means to carry on the suit; that he had failed, made an assignment, and had gone through the Two Third Act; that the witness told him he would succeed in the action; that the suit was frivolous, and the complaint would be dismissed; that they would go on and defend the action, and that they would get a bill of costs out of the plaintiff, for their services, which would belong to them, the attorneys, and that Cook said, "certainly, that's all right," or other words expressing assent to the agreement or arrangement. The attorneys went on, paid all the disbursements, and defended the suit, which was a protracted litigation, having been carried by the plaintiff to the Court of Appeals, and when judgment was rendered in Cook's favor for the costs above stated, he assigned the judgment to them.

The judge below found that, after the commencement of the suit and before the trial, an arrangement and agreement was made between Cook and the Messrs. Sherwood, that the costs to be recovered were to belong to them, and I think that he was warranted by the facts in so finding. This agreement was made before the defence of the suit was made by the defendants Sherwood, and the services which they agreed to render, and did render, was a good consideration for the making of such an agreement. The question of an attorney's lien, so much discussed in the various stages of this case, does not in fact arise. By the long established practice of the courts the attorney has a lien upon the judgment for his costs, subject, however, to the equitable right of the parties to set off one claim against another;

and if the parties settle in fraud of the attorney's lien, the judgment will be enforced to the extent of the lien. But the defendants Sherwood did not call upon the court to protect a lien which they had upon the judgment for costs, or interpose any such lien as against the plaintiff's right of set-off. They are the assignees and owners of the judgment which has been assigned to them by Cook in consideration of an agreement, which he made with them when they undertook the defence of the suit, that the costs should belong to them. Their right is founded primarily upon a transfer or equitable assignment by Cook to them of a thing in expectancy, which was valid and will be sustained by the courts. "Whatever doubts may have existed heretofore," says Willis, J., in *Field* v. *The Mayor, &c. of New York*, (2 Seld. 187, "the better opinion now is, that courts of equity will support assignments not only of things in action, but of contingent interests and expectancies, and of things which have no present actual existence, but rest in possibility, provided the agreements are fairly entered into, and it would not be against public policy to uphold them." Before these costs were created, and before it could be known that Cook would ever be entitled to any—when the matter rested in mere expectation and possibility—they made this agreement, that they were to have the costs for their services as attorneys, and if any doubt existed before the Code as to the right of an attorney to make such an agreement, none can exist now, the Code having repealed all laws restricting or controlling the right of a party to agree with his attorney for his compensation. They gave their services and paid the disbursements in the long course of the litigation. Their expectation was realized; the plaintiff failed in his suit, and when a judgment was rendered in Cook's favor for costs against the plaintiff, as the costs by the previous agreement belonged to the Sherwoods, Cook assigned the judgment to them. The defendants Sherwood, therefore, cannot be regarded as assignees taking subject to the plaintiff's right of set-off, but as assignees of a judgment nominally in the name of Cook, the whole interest in which belonged to them when the judgment was rendered. This case,

consequently, is distinguishable from *The People* v. *Manning*, (13 Wend. 649), which was also a judgment for costs assigned to the attorney, for there no such prior agreement existed; in addition to which, the case is of no authority, as it was subsequently reversed; and the case before us is equally distinguishable from *Nicoll* v. *Nicoll*, (16 Wend. 446), in which the attorney, relying simply upon his lien upon the judgment for his costs, was not allowed to interpose it against the appellant's statutory right to a set-off.

The defendants Sherwood, then, being the parties who had the sole interest in this judgment when it was rendered, through their previous agreement with Cook, the plaintiff had no claim to set off his judgment against it, and having failed in this, I do not see that he could be entitled to any judgment. I know of no authority entitling him to maintain an equitable action to have Cook's discharge as an insolvent declared null and void, unless that discharge was an obstacle to the attainment of some right to which the plaintiff was entitled. If the judgment recovered in Cook's name, for costs, belonged to him, and the plaintiff would have an equitable right to set off against it his judgment against Cook, if that judgment was not affected by the discharge granted to Cook; upon the ground, that the discharge was null and void, then the validity of the discharge would be connected with the equitable remedy of the right of set-off. But having no right of set-off, the validity or invalidity of the discharge becomes immaterial; or if this was an action upon the judgment, the invalidity of the discharge would be material, for, if valid, he could maintain no such action; but it is not an action upon the judgment, but an equitable action to compel a set-off, which, if allowed, is to be followed by a judgment for the balance due after allowing the set-off. If the set-off is not allowed, then the action fails; for what was asked in addition was dependent and contingent upon the granting of the set-off; or if he sought to set the discharge aside upon the ground of fraud, the case might be different, but the objection to the discharge is that the judge who granted it never acquired any

jurisdiction; and, as that appeared upon the face of the record, the discharge interposed no obstacle to the plaintiff enforcing his judgment. If he brought an action upon the judgment, or issued an execution upon it, and levied it upon the property of Cook, the discharge would be unavailable to Cook. An exhibition of the record upon which it was founded would show it to be worthless. There was no ground, therefore, for invoking the equitable aid of the court. The plaintiff had an ample remedy; or, rather, was not in want of any equitable remedy, and judgment should have been given for all the defendants.

This view of the case dispenses with the necessity of considering the question raised as to the sufficiency of the statement upon which the judgment was entered by confession. But I agree that the statement did not come up to the requirement of the statute; and I agree, also, that even if the answer would be regarded as admitting the existence of a valid judgment, that the plaintiff, having shown the fact to be otherwise, is bound by it. If the defendant means to rely upon any fact as a defence, he must set it up in his answer, that the plaintiff may be duly notified, and come prepared to meet it; but if the fact is shown by the plaintiff himself, this reason does not apply, and it does not lie with him to object after he has shown the court that he has no cause of action. The rule upon this subject is stated by the master of the rolls, Sir John Leach, in *Stanley* v. *Robinson*, (2 Mylne & Craig, 527): "The distinction is this:—a defendant is not permitted to avail himself of a defence which appears only upon his evidence, and was not stated in his answer, so that the plaintiff could be prepared to repel it. But if it appears, upon the plaintiff's own case, that he is not entitled to the relief prayed, the court will not assist him."

But I do not agree that Cook could avail himself of the insufficiency of the statement. It was an objection available to Cook's creditors, or to a subsequent purchaser, but as against Cook, the party who swore to the statement with the design and object that a judgment upon his confession should be entered in

favor of the plaintiff, the judgment is conclusive and valid. *Beekman* v. *Kirk*, 15 How. 221; *Griffen* v. *Mitchell*, 2 Cow. 548; *Moody* v. *Townsend*, 3 Abbott, 375, and note; *Neusbaum* v. *Keim*, 1 Hilton, 520; *Kendall v. Hodgkins*, 7 Abbott, 309, *Chappell* v. *Chappell*, 2 Kernan, 215; *Dunham* v. *Waterman*, 17 N. Y. R. 9.

Judgment in favor of the defendants Sherwood affirmed, with costs, and the judgment in favor of the plaintiff against the defendant Cook, reversed, without costs.

GEORGE W. PALMER *v.* CHARLES MOELLER.

Leave to go to the Court of Appeals in an action commenced in a district court, will not be granted, where the question decided by this court relates only to the practice in those courts under the provisions of the District Court Act, and a case involving the same question has been previously permitted to be taken to the Court of Appeals.

So *held* in a case where, upon appeal, the judgment was reversed, because the action was commenced by a non-resident plaintiff by long summons, and without giving security for the defendant's costs.

MOTION for leave to appeal to the Court of Appeals from a judgment of this court at general term, reversing a judgment of a district court.

Elijah B. Holmes, for the motion.

H. C. Place, opposed.

By the Court, HILTON, J.—This action was commenced by a non-resident plaintiff, by long summons, and without giving the security required by the "Act relative to the district courts," passed in April, 1857. At the trial, upon these facts appearing, the defendant asked that the action be dismissed, (see Act, sec. 45),

which the justice refused. We held this to be error, and therefore reversed the judgment. The respondent now asks for leave to go to the Court of Appeals, that he may have our decision upon this question reviewed.

We have already permitted a case involving this precise point to be taken to that court, and as the question is mainly one of practice in justices' courts under the provisions of the act referred to, not involving the merits of an action, and in that point of view cannot be said to affect any substantial right of a party, we do not feel disposed to multiply cases on the subject in the Court of Appeals.

For this reason the application is refused.

Motion denied.

RICHARD B. CONKLIN *v.* JACOB A. STAMLER.

The account books of a party cannot be used as evidence of the sale and delivery of goods charged therein, without previously showing that some of the articles charged have been delivered; that he kept no clerk, and that others dealing with him have settled their accounts by his books, and found them accurate.

The origin of this rule of evidence explained.

It seems that it arose from necessity, and owes its origin to the fact that, formerly, a party could not be a witness in his own behalf; and as the reason for it has now been obviated, by permitting parties to be examined, the rule no longer exists.

APPEAL from a judgment rendered in the Fourth District Court in favor of the plaintiff. The action was brought to recover for goods sold and delivered. It appeared that the plaintiff was a butcher, and kept no clerk. At the trial he produced an account book, containing charges against the defendant, and two witnesses were examined who testified that they had dealt with him, had settled their accounts by a book similar to the one produced, and they had found it correct. It was not shown that the defendant had ever dealt with him, or that any one of the articles

charged against him had been delivered or that the book produced was his account book with his customers. Judgment having been given for the amount claimed, the defendant appealed.

S. V. Loomis, for the appellant.

R. Gosman, for the respondent.

BRADY, J.—The only proof made in the court below was, that the plaintiff had no clerk or bookkeeper, and that persons dealing with him had settled with him by his books. There is no evidence, either, that the defendant dealt with him, or of the delivery of any one of the articles named in the bill of items. The courts have required, in similar cases, that a foundation should be laid for the introduction of this kind of evidence, which consists of proof, that the plaintiff had no clerk, that some of the articles charged have been delivered, that the books produced are the account books of the party, and that he keeps fair and honest accounts; and this by those who have dealt and settled with him. *Vosburgh* v. *Thayer*, 12 Johns. 461; *Dumell* v. *Sutherland*, 11 Wendell, 568. The admissibility of the books, on such proof, is put upon the ground of necessity, arising from the former incompetency of the claimant to be a witness in his own behalf. The reason of the rule seems to have been destroyed by the act of the legislature authorizing the examination of parties in their own behalf; but however that may be, the testimony on behalf of the plaintiff was not sufficient to make the book produced evidence, and the judgment must be reversed. There was neither evidence that the defendant dealt with the plaintiff, nor of the delivery of any of the articles.

DALY, First Judge.—In *Morrill* v. *Whitehead* (4 E. D. Smith, 239,) it was proved that the books produced were the account books of the party; that he had no clerk, and that he kept fair and honest accounts; but, as there was no proof that any one of the services entered in the book had been actually rendered, we

reversed the judgment. This is the first case, in this state, that has gone, I think, that length, or in which it was distinctly determined that some of the articles or services charged in the account must be shown to have been actually delivered or rendered; though it has been frequently intimated that that proof was essential before the books could be received or used in evidence. *Vosburgh* v. *Thayer*, 12 Johns. 461; *Sickles* v. *Mather*, 20 Wend. 76; *Foster* v. *Coleman*, 1 E. D. Smith, 86. The decision in *Morrill* v. *Whitehead* is decisive of the present case, as the only proof before the justice here was that the plaintiff had no clerk, and that persons who had dealt with him, and had settled by his books, had found them to be correct.

But even if this proof had been supplied, I am of opinion that it would not now be sufficient to authorize a judgment. The practice of allowing the party's books of account to be received as sufficient evidence of the existence of the debt, which was contrary to the English rule, (3 Bl. Com. 368; *Marriage* v. *Lawrence*, 3 B. & Ald. 142), came into use in this state, and in New Jersey, with the early Dutch colonists, in whose courts merchants and traders were always allowed to exhibit their books of accounts, where it was acknowledged or proved that there had been a dealing between the parties, provided the books had been regularly kept, with the proper distinction of persons, things, year, month, and day. Full faith and credit were then given to them, especially when they were strengthened by the oath of the party, or where the creditor was dead. See "Account of the Dutch Tribunals of New York," in Introduction to 1 E. D. Smith's R. xxx. And the practice long established in the eastern states, of receiving such books as evidence, is presumed to have been introduced by the English colonists from Holland who settled New England. Per BRAINARD, J., in *Beach* v. *Mills*, 6 Conn. R. 496.

In the Dutch colonial courts, the parties appeared before the court and made their own statement; and if they differed as to a fact which the court thought material, either party might be put to his oath, so that the objection made to this species of evi-

dence, was, in these tribunals, of less force, as the party who made the entries could be interrogated in respect to the truth or correctness of each item. In New England they very wisely retained the feature of the supplementary oath of the party substantiating the truth of the entries in connection with the practice of allowing such books as evidence, and where the matter is not regulated by statute, which is the case in Maine and Rhode Island, long usage has established that the books of account must be supported by the oath of the party. 3 Griffith's Law Reg. 1005; id. 116; 3 U. S. Law Intelligencer, 227.

In *Case* v. *Potter*, (8 Johns. 211), the practice of allowing the entries of the parties, made in the usual course of business, to be received as evidence, was recognized as a usage established in the courts of this state. It was declared to be contrary to the course of the common law, a circumstance that greatly embarrassed the court, finding, as they expressed it, that the usage had crept in, and that it was difficult or impossible, in many cases, to give proof of a sale and delivery. They adverted to the custom, in other countries, of requiring, in respect to such evidence, the supplementary oath of the party to give it full effect, but declared that they had no authority to require or admit the oath of the party; and, instead of doing one thing or the other, either repudiating the practice as contrary to the common law, or else holding that it had been the law from the early settlement of the colony, and was therefore not affected by the provision of the constitution, retaining such parts of common law as formed the law of the colony before the battle of Lexington, they simply said that if this mode of proof was to be tolerated, the party's books could not be used to prove charges for cash lent. This was leaving the whole question unsettled, and consequently it speedily came before the Supreme Court again in *Vosburgh* v. *Thayer*, (12 Johns. 465), when the court divided. PLATT, J., delivered a long opinion, declaring that it was repugnant to the common law. He condemned the courts of New England and the state of Pennsylvania for adopting a rule of the civil law instead of the English rule; declared that by our law a party

could not be allowed to swear to his accounts; that the rule, even with that qualification or condition, would be no security against false accounts, and predicted that the recognition of such a practice, upon the plea of necessity, would be followed by most mischievous consequences.

But the other members of the court, in an opinion *per curiam*, thought that the usage and the necessity of admitting such proof had been too long sanctioned and felt in our courts, and that it was then too late to question its admissibility; but instead of simply recognizing the practice as it had prevailed in the Dutch tribunals, and declaring that the party should or could be examined under oath as to the truth or correctness of the entries made by him, they devised, as a test and safeguard, the special preliminary proof which has since been required as a condition precedent to the admission of the books, influenced, no doubt, by what was said by the whole court in the former case, and what was strongly insisted upon by Judge PLATT in his dissenting opinion, that they had no authority to require, and could not admit, a party to be sworn as a witness.

The examination of these cases will show that the court had no very clear conception of the nature of the question before them, which was simply whether this practice was the law of the colony before the revolution; for if, by long usage and general adoption, it had, before that event, become the recognized mode of proving facts in certain cases, then it was the law of the colony, instead of the opposite English rule, which, being repugnant, was not in force at the breaking out of the revolution, and was, consequently, not embraced in the retaining clause of the Constitution. If they had known, which they probably did not know, that the rule which they found in use had existed from the time of the Dutch, and had been in practical operation for more than one hundred years, they would have found an easy solution of the difficulty by simply declaring, as the New England courts had done, that it had been in use from the earliest period of the colony, and had thus grown into a common law by general acquiescence and long established usage. This con-

clusion would have relieved them from all difficulty in respect to the feature by which the supplementary oath or examination of the party as to the truth of the entries might be required, for as it formed just as much a part of this course of procedure as any other, and rested upon the same general authority—long settled usage—they had nothing to do but to recognize the whole.

But instead of doing this, they looked into the English books and found that Lord HOLT had said twice, at *Nisi Prius*, (*Pitman* v. *Madox*, Holt, 298, and *Price* v. *The Earl of Torrington*, 1 Salk. 285), "that a tradesman's shop book was not of itself evidence, without something more, and they undertook to supply what that 'something more' should be." It was the rule of the common law that the party to the record could not be a witness, and Blackstone had declared (3 Com. 368) that the practice abroad of allowing a merchant's books, with his supplementary oath, to amount at all times to full proof, was a distortion of the civil law; in which, it may be remarked, he was mistaken; for to make the books sufficient evidence, in countries where the civil law prevails, something more than the supplementary oath of the party is requisite. Domat, part 1, b. 3, § 2, art. 9; Meyer's Institutiones Judiciaries, c. 14, p. 387; Cod. 4, 19, 5, 7; Code Civil, L. 3, T. 3, § 5, art. 1367. The judges, no doubt, concluded from the rule of the common law, and from Blackstone's interpretation of the civil law, that the oath or examination of the party in substantiation of the entries could not be allowed. But feeling the imperative necessity of permitting, in certain cases, the books, when kept by the party, to be used as instruments of evidence, or rather the injustice and absurdity of not allowing them to be taken into consideration at all, they evidently thought that the usage which they found existing might be recognized, and the requirement of Lord HOLT satisfied by the preliminary proofs which they devised and required as a condition precedent to giving the books in evidence. New Jersey and Georgia appear to be the only states that have imitated the example of New York. In fourteen of the states, either by statute or by the re-

cognition of the courts, the oath of the party is required in corroboration of the entries, while in five of the states the books are not allowed to be given in evidence at all. *Nelly* v. *Holmes*, 3 Ala. 642; *De Camp* v. *Vandegroft*, 4 Blackf. 272; and cases collected in note 201, 3 Cowen & Hill's Notes to Phillipps' Ev., 3d ed., 297, and in note to 1 Greenleaf's Ev., § 117.

But the important change recently made in the law of this state, by which a party may testify the same as any other witness, has obviated the difficulty that was supposed to exist when the rule above referred to was recognized, and there is now no occasion for resorting to the books unless it may be to refresh the party's memory as to the items, or in cases where there is a failure of recollection. In the latter case, the books, if they contain the original entries of the transaction, would still, I apprehend, be evidence within the rule recognized in *Merrill* v. *Ithaca & Oswego Railroad Co.*, (16 Wend. 586); that is, if the party who made the entries has entirely forgotten the facts which he recorded, but can swear that he would not have entered them if he had not known them at the time to be true, and that he believes them to be correct. But I agree with Judge BRADY that the books, except in the cases above put, can no longer be received as sufficient evidence of the sale and delivery of goods, or of the performance of services, by merely proving the preliminary facts, which, heretofore, made them sufficient evidence; but that the party, if he have no other means of establishing the facts, must go upon the stand as a witness, resorting to his books only where it is necessary to refresh his memory as to the items, or where, from a failure of recollection, he is compelled to rely upon them alone, and can swear to what is required to warrant their introduction, as evidence to be submitted to the tribunal that is to pass upon the facts.

Judgment reversed.

GEORGE LAMBERT *v.* GEORGE SEELY.

If a defendant, after moving for a non-suit at the trial, upon the ground that the evidence is insufficient to justify any recovery, supplies the proof, the want of which formed the basis of the motion, it will be no ground for reversing the judgment on appeal, that the proper evidence was not before the court at the moment the non-suit was asked.

In an action for goods sold and delivered, it is necessary to a recovery, that the price or value of the goods should be shown.

A receipt upon a bill of goods sold, is conclusive evidence of payment, unless contradicted or explained.

APPEAL by the defendant from a judgment rendered by the Fourth District Court in favor of the plaintiff. The facts sufficiently appear in the opinion.

Solomon L. Hull, for the appellant.

Francis Byrne, for the respondent.

By the Court, HILTON, J.—The plaintiff sued to recover the value of certain picture frames, alleged to have been sold and delivered by him to the defendant. Upon the trial the plaintiff was sworn and examined as witness on his own behalf, and then rested his case. His testimony, in substance, was, that he sold the frames to the defendant, who called at his store and ordered them in May, 1856; that the articles were sent from his store, to be delivered at the defendant's house by one of his clerks, he could not tell which, nor did he know of all being sent; and as to whether they were actually delivered or not he did not know—he did not see them delivered. In August, 1856, he had a clerk in his employ named Hatch, who was in the habit of selling goods for him and receipting bills, and had authority from him to do so. A receipted bill of the goods in question was then produced, signed by Hatch for the plaintiff, and which the plaintiff swore was in Hatch's handwriting. Upon this testimony,

and without any proof whatever as to the value of the goods thus sold, the plaintiff rested his case, whereupon the defendant moved for a non-suit, which the justice denied. The defendant excepted, and then offered evidence on his part. The justice subsequently gave judgment for the plaintiff, and the defendant appeals, stating as one of his grounds of appeal, that the justice erred in refusing the non-suit.

The decision of the justice upon this motion was clearly erroneous, and his judgment must be reversed. The plaintiff's testimony showed no cause of action whatever against the defendant. Apart from the receipt, which, unexplained or uncontradicted, was conclusive against his recovery, (1 Greenleaf's Evid., sec. 305,) it did not appear that the goods were ever delivered, nor what, if anything, was their value.

A plainer case for a non-suit could scarcely be conceived.

I am aware of the well settled rule that, if a defendant, after a motion for non-suit, himself supplies the evidence, the want of which formed the ground for the motion, the judgment will not be reversed, on appeal, because the proper evidence was not before the court at the moment the non-suit was asked. (*Schenectady and Saratoga Plank Road Co.* v. *Thatcher*, 1 Kernan, 102; *Hyland* v. *Sherman*, 2 E. D. Smith, 234.) Here the defendant did not supply the omission. It is true, he stated that a part of the frames were delivered, and only denied the receipt of one of those charged against him. But he furnished no evidence of the value of those he admitted the receipt of, beyond describing them by the prices stated in the receipt produced.

Besides, it appeared that they were purchased by him from a Mr. Westbrook, who was at the time in business with the plaintiff, upon the distinct agreement that the price should be credited on a note of Westbrook's, then held by the defendant. The plaintiff knew of this agreement at the time of the sale, and assented to it; under it the frames were delivered, and afterwards, on Westbrook delivering to the defendant the receipt referred to, the amount charged was credited on the note.

Under what circumstances the receipt was obtained by West-

brook, does not appear, beyond his statement that the plaintiff agreed to furnish the frames on his, Westbrook's, account. Whether he paid Hatch in money, or in what manner the bill was settled, is not shown, although the plaintiff might have furnished the information had he chosen to have done so. His silence upon this subject affords a strong presumption against his present claim, and, taken in connection with the positive evidence on the part of the defendant respecting the agreement, and the receipt which throughout was uncontradicted either by the plaintiff denying the authority of Hatch to give it in his name, or that he received anything for it, satisfies me that the finding of the justice was not only unsupported by the evidence, but was contrary to it, and should be reversed.

Judgment reversed.

ALICE MORGAN *v.* ANNA ANDRIOT.

A married woman cannot contract so as to bind herself generally, and her general personal engagements will not operate so as to bind her separate estate.

The laws relating to married women, passed in 1848 and 1849, have not removed this general disability to contract.

It seems, the husband of a woman engaged in business is liable for debts or obligations contracted or incurred by her with his assent, either express or implied.

A claim for damages arising out of a violation of a contract made by a married woman, granting the use of a thing attached to a freehold, possesses none of the elements necessary to obtain relief against her separate estate. Per BRADY, J.

APPEAL from a judgment of the First District Court awarding the plaintiff $15 damages, with costs. The defendant appealed. The facts sufficiently appear in the opinion.

Joshua M. Van Cott and Nicholas P. O'Brien, for the appellant.

Peter Y. Cutler, for the respondent.

By the Court, BRADY, J.—The defendant rented to the plain-

tiff the second floor of the premises 504 Broadway, and agreed that the plaintiff should have the use of the gas fixtures on that floor, for the purpose of burning gas to light the same. At the time the lease was made, and at the time the agreement was made, assuming them to be independent of each other, the defendant was a married woman, but doing business in her own name, as a *feme sole*, at 504 Broadway. The renting seems to have been the renewal of a hiring which had ended on the 1st of May 1857, and there is testimony tending to prove that the agreement for the gas was subsequent to the hiring. The plaintiff so alleges, and it may, for the purposes of this appeal, be assumed to be true. In October following (1857,) the defendant caused the gas pipes connecting with the fixtures in plaintiff's apartments to be cut off or disconnected, and for the damages occasioned thereby, that act being in violation of the agreement thereto relating, the plaintiff brought her action in the court below. It also appeared that the husband of the defendant had, in 1856, absconded or run away, and had not returned at the time of the trial. The first question presented on these facts is, whether an action could be maintained against the defendant for the cause alleged. I think not. A married woman, at law, has no power to contract so as to bind herself generally, (*Jackson* v. *Vanderheyden*, 17 Johns. Rep. 167; *Birdseye* v. *Flint*, 3 Barb. S. C. R. 500; *Vanderheyden* v. *Mallory*, 1 Com. 462), and courts of equity, in conformity with this principle, hold that her general *personal* engagements will not affect her separate property. The acts of 1848 and 1849, relative to married women, have not removed their disability to make contracts, or changed the rules of law in regard to them in that respect. *Cobine* v. *St. John*, 12 How. Pr. R. 333; *Coon* v. *Brook*, 21 Barb. 546; *Yale* v. *Dederer*, 21 Barb. 286; *Rouillier* v. *Wernicki*, 3 E. D. Smith, 310. The fact that a married woman is doing business on her own account apparently, and with her own estate, does not alter the rule, although courts of equity might enforce any debt contracted for the benefit of her estate, which was intended to be a charge upon it. The husband would be liable for any debt

contracted or obligation incurred with his assent, express or implied, (*Yates* v. *Brower*, 5 Selden, 205), and would be responsible for her business engagements made under such circumstances. In England, by a particular custom of the city of London, a married woman is enabled to carry on trade as a *feme sole* merchant. The trade must, however, be carried on within the city, and for the wife's sole account. If the husband meddle with it, he will not be protected by the custom. 2 Bright on Husband and Wife, 76, 77. It seems also to be the rule in England, that when the husband is an alien enemy the exception does not apply, nor where he is banished for life. The cases on this subject will be found in 2 Bright on Husband and Wife, 70, 72, 73. The case of *Beggot* v. *Frier* (11 East. 301,) is, however, in point. The action was trespass, and it appeared that the husband came to this country in 1805, leaving his wife destitute; that the plaintiff had lived separate from him since that time, and had made contracts, and for her support had carried on trade as a *feme sole*. The court held that she could not maintain the action. *Marshall* v. *Rutton*, 8 Term Rep. 545.

In this case the defendant is not charged with any debt contracted with reference to her business, or for the benefit of her estate. It is for damages occasioned by the violation of a contract granting the use of a thing attached to a freehold, and the claim does not present any of the elements necessary to obtain relief against the estate of the defendant, if the action had been brought for that purpose. I have not been able to find any case in this state where, under circumstances like those disclosed here, a married woman has been held liable sued alone, and I think he judgment of the justice cannot be sustained on precedent or authority. If a contract be made with a married woman, the contracting party takes it subject to the legal disabilities, and must rely either upon her separate estate and the facts necessary to charge it, or the liability of the husband, founded upon his supposed assent.

Judgment reversed.

FREDERICK GRIMM *v.* DEIDERICK HAMEL.

Any person present in court, and hearing the evidence of a witness on a trial, is as competent afterwards to testify in respect to what the witness said as the judge who presided.

A judge's minutes of testimony taken upon a trial are not evidence *per se*; and when produced can only be resorted to as memoranda to refresh his memory.

It seems, where improper testimony is admitted under objection, and the party objecting afterwards introduces proof of the same state of facts, the objection is thereby waived.

A party is not required to produce papers at the trial unless previous notice has been given him requiring their production; and the fact that he has the papers in court does not operate to dispense with the notice, unless the nature of the case apprises him that they will be necessary on the trial.

The object of the notice is not only to obtain the papers or lay the foundation for secondary evidence of their contents, but also to give the party notified an opportunity to procure testimony to support or impeach them, or to show that no such papers as those called for ever existed.

The proceedings and judgment of a justice, though not technically a record, yet the material facts being in writing must be produced, and parol evidence ought not to be admitted respecting them.

The nature of an action in the Marine Court, or in a justice's court, or the judgment rendered therein, cannot be proven by parol.

APPEAL from a judgment of the Seventh District Court. The appeal rested upon exceptions by the defendant to evidence admitted or rejected at the trial, and which are fully set out in the opinion. Judgment having been given in favor of the plaintiff, the defendant appealed.

Samuel Jones and George Carpenter, for the appellant.

Shaffer, Garvin & Dodge, for the respondent.

By the Court, HILTON, J.—The complaint in the court below alleged an indebtedness by the defendant to the plaintiff in $250, for moneys paid at the defendant's request, and also for moneys lent and advanced, and goods sold and delivered to him. The

answer was a general denial, and in addition claimed a set-off to the amount of $250 for work, labor and services. Upon the issue thus presented a trial was had, and the justice gave judgment for the plaintiff. The defendant appeals, and the grounds of the appeal consist of exceptions taken at the trial to the admission and rejection of evidence by the justice, and these exceptions I propose to examine in the order in which they appear upon the return.

1. Thomas Egan, a witness produced by the plaintiff, testified that on a trial in an action in the Marine Court, brought by the plaintiff in this action against the witness and others, the defendant was sworn, and testified to the state of the accounts between him and the plaintiff. That he then and there heard the defendant testify that the plaintiff lent him $400, and that he, the defendant, owed the plaintiff, on account of such loan, a balance of $190. This evidence was objected to on the ground that the judge's minutes of the testimony should be produced.

The justice very properly overruled the objection. The judge's minutes would not be evidence *per se*, and if produced could not be resorted to but as memoranda to refresh the memory of the judge who made them. *Green* v. *Brown*, 3 Barb. 119; Greenleaf's Ev. §§ 436, 437; *Lawrence* v. *Barker*, 5 Wend. 301; *Feeter* v. *Heath*, 11 Wend. 477. Any person who was present in court and heard the testimony of the defendant, was as competent to testify in respect to what was stated by him as the judge who tried the cause. *Robertson* v. *Caw*, 3 Barb. 410.

2. On the cross-examination of the same witness, Egan, he was asked by the defendant's counsel, "What was the nature of that action?" The plaintiff objected to this question upon the ground that the record and pleadings should be produced. The justice sustained the objection, and in this I think he was also right; but the objection was obviated by the subsequent admission of evidence on the part of the defendant, showing for what the action was brought.

3. The defendant, being sworn as a witness on his own behalf, testified that he paid the plaintiff the $400 originally borrowed

of him, by giving him a bill of sale of a grocery store in 49th street. The defendant then called upon the plaintiff to produce the bill of sale, or that he be allowed to give parol evidence of its contents. The plaintiff denied ever having any such paper; and added, as a further objection to the admission of such evidence, that no notice had been given to him to produce the paper. The question was then put to the defendant, "What was the consideration expressed on that bill of sale?" This was objected to by the plaintiff, and overruled by the justice.

It is claimed by the defendant that the statement that the plaintiff never had such a paper, dispensed with the necessity of giving the notice to produce it. I do not, however, concur in this view. As a general rule, a party is not required to produce a paper unless the opposite party has given him notice to produce it, (*Waring* v. *Warren*, 1 John. 340; Greenl. Ev. § 560), and proof that the adverse party has the paper in court, does not even dispense with the notice; for the object of the notice is not only to procure the paper, or to lay the foundation for the introduction of secondary evidence of its contents, by showing that the party has done all in his power to procure the original; but also to give the opposite party an opportunity to provide the proper testimony to support or impeach it, or to show that no such paper ever existed. *Doe* v. *Gray*, 1 Stark. R. 225; *Jackson* v. *Woolsey*, 11 John. 453; Greenl. Ev. §§ 561, 562; *Rogers* v. *Van Hoesen*, 12 John. 221; *Gorham* v. *Gale*, 7 Cowen, 739.

The form of the pleadings in this case were not such as would apprise the plaintiff that any paper in his possession would be necessary for the defendant on the trial, (*Hammond* v. *Hopping*, 13 Wend. 505; *Edwards* v. *Bowman*, 1 Sand. S. C. 610), and, indeed, it is difficult to perceive upon what view the evidence was material to the determination of the issue between the parties. The answer was a general denial of indebtedness. No allegation of payment was contained in it, and under the pleadings the justice might very properly have excluded the evidence offered. His decision, therefore, was right. But in addition to this, it appears by the subsequent testimony in the cause that no such

paper ever existed; that the bill of sale thus spoken of was no other than a chattel mortgage, which it appeared was not in the defendant's possession, and thus, in every aspect of the case, the justice very properly excluded the evidence.

4. The theory of the defence at the trial seemed to be that the plaintiff was paid by accepting a bill of sale of the grocery store referred to, or else that he received from the defendant a mortgage on the store as a security for the amount loaned, and that the action in the Marine Court was to recover the value of the property thus mortgaged, which had been taken by the witness Egan and others, upon an execution against the defendant in this action, and sold as his property. Egan was subsequently recalled by the defendant, to show the result of this trial in the Marine Court, and that the plaintiff recovered therein judgment for the value of the goods thus taken. To this it was objected that the record of the proceedings in the Marine Court should be produced, and that parol testimony was incompetent for the purpose for which it was offered.

As I before stated, the justice properly sustained this objection. In the language of the court in *Posser* v. *Brown*, (11 John. 166): "Though the proceedings and judgment before a justice may not be technically a record, yet the material parts are in writing and ought to be produced. Parol evidence of such proceedings are not the highest or the best evidence in the power of the party, and ought not therefore to be admitted." Such also is substantially the rule stated in Greenleaf's Evidence, (§ 513), and in addition, it may be remarked that the evidence, if admitted, would have been wholly immaterial. At most it would only have shown that the plaintiff had recovered a judgment in respect to property covered by a chattel mortgage given to him as security for the payment of the plaintiff's indebtedness. This fact, if conceded, would not have affected the defendant's liability, or deprived the plaintiff of his right of recovery in this action.

There is no reason whatever for interfering with the decision of the justice, and his judgment should be affirmed.

Judgment affirmed.

Edward Williams v. Leone Carroll.

Where upon proceedings supplementary to execution, founded on a judgment of a district court, a transcript of which has been filed with the county clerk, it appears that at the time of the recovery of the judgment the defendant was a married woman, the proceeding will be dismissed.

A justice of a district court has no jurisdiction of an action against a married woman, and can give no personal judgment against her.

If she is possessed of a separate estate, and obligations are incurred by her in respect to it, they can only be enforced in a court of equity, as a charge against it, but never as a personal liability.

It seems, that judgments in such actions are not enforced by execution, but operate as a lien upon the estate charged, and are enforced as in rem.

Where, upon the examination of a party on supplementary proceedings, it appears that he has sold property which belonged to him, and received therefor its full value, any inquiry as to the name of the purchaser is immaterial.

But it is otherwise where it is shown that the property has been disposed of for less than its value, upon condition that he should have it back on repaying the amount received for it.

Appeal by the plaintiff from a decision of a judge at chambers, and an order entered thereon, refusing to allow a certain inquiry to be made of a defendant, upon her examination on proceedings supplementary to execution.

The facts are sufficiently stated in the opinion.

Lewis Beach, for the appellant.

Henry H. Morange, for the respondent.

By the Court, Hilton, J.—The plaintiff recovered judgment in a justice's court, and on filing a transcript with the county clerk, execution was issued out of this court to the sheriff. Upon its return unsatisfied, supplementary proceedings were instituted under an order of one of the judges of this court to examine the defendant respecting her property. On her examination before the referee, it appeared that at about the time of the

recovery of the judgment she was the owner of a watch and chain of the value of $150, but which she had since "sold for $50, upon condition that if she had the money at any time she might take it back." Being asked to whom she had so disposed of the watch and chain, objection was interposed to the question by her counsel, and the referee refused to allow the inquiry. Upon motion at special term, this decision was sustained, and from the order then made the plaintiff appeals.

From the opinion of the judge, indorsed upon the papers submitted, it appears that his decision was based on the presumption that a question similar to the one proposed, had been previously passed upon and disallowed by me; and from the referee's minutes it is manifest that his ruling was founded upon a like impression. On reference, however, to the testimony, it will be seen that, at the time the question was rejected by me, it simply appeared that she had been the owner of a watch, which she had disposed of; but it did not appear that it was worth anything beyond the amount she received for it. Under these circumstances, it seemed to me quite immaterial to whom she had sold it, until it was first shown that she possessed some valuable interest in it. This was subsequently made to appear; and when the question was last put it was proper, and would now be allowed but for a fatal objection to these proceedings, which is presented to us by the defendant's examination submitted.

To the inquiry of the plaintiff's counsel as to whether she is a married woman, and if her husband is living, she answers in the affirmative; and it is shown, in addition, that she was married at the time the judgment was recovered against her. This being the fact, (and we cannot overlook it), the justice had no jurisdiction to give any judgment whatever in this action brought before him, and the judgment he has attempted to render cannot be enforced. It has long been settled that no personal judgment can be given against a married woman. If she is possessed of a separate estate, and obligations are incurred by her in respect to it, they will be enforced against it in a court of equity as a charge, but never as a personal liability. *Rogers* v. *Ludlow*, 3

Sand. Ch. R. 104; *Yale* v. *Dederer*, 18 N. Y. Rep. 265. In such actions judgments are not enforced by executions, but are declared a lien upon the separate estate charged, and enforced as *in rem*. *Chapman* v. *Lemon*, 11 How. 235; *Yale* v. *Dederer*, 21 Barb. 286; *Coon* v. *Brook*, 21 Barb. 546; *Dickerman* v. *Abrahams*, id. 551. Justice's courts possess none of the peculiar powers of courts of equity which enables them to give relief in cases like these; and, being purely equitable actions, they have no jurisdiction whatever in respect to them.

Under these circumstances we will not assist in the enforcement of the plaintiff's judgment, and the appeal taken is dismissed, with costs.

Ordered accordingly.

WILLIAM WALLACE *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

A municipal corporation is a living party within the meaning of section 399 of the Code, and in an action against it, the plaintiff may be examined as a witness in his own behalf.

The corporation of the city of New York is bound to keep the streets opened within its limits for public use, in such repair that they may be safely traveled upon: and for any injuries happening to persons through the neglect of the corporation to perform this duty, it is liable.

The sidewalk is a part of the public street, and although the corporation may impose, by ordinance, the duty upon the adjoining lot owner of keeping the sidewalk in repair, yet it does not thereby relieve itself of the duty imposed upon it by law, to keep in repair the streets of the city.

The liability of the corporation for the neglect of such a duty, differs from those cases where injuries result from obstructions placed in the streets by individuals, and in respect to which it cannot be held liable, unless it is shown that notice of the obstruction was given to its proper officers, and they had neglected to cause it to be removed.

W., while walking on Eleventh avenue at night, fell into a large hole in the sidewalk, and was severely injured. In an action to recover for the injuries, it was not shown that the corporate authorities knew of the existence of the hole. The judge, at the trial, instructed the jury that they might give exemplary damages

if they thought the corporation was guilty of gross negligence in suffering the hole to remain in the condition it was. *Held*, erroneous. That only such damages could be allowed as were the legitimate and direct result of the accident.

Punitive or vindictive damages can be recovered only in cases where person or property has been injured by the willful act of another, or where the act causing the injury was the result of wantonness, or reckless indifference to the rights of others.

APPEAL from a judgment and an order made at a special term, denying a motion, on the part of the defendants, for a new trial. The action was to recover for injuries resulting from the neglect of the defendants to keep in repair the sidewalk of Eleventh avenue near Thirty-first street, the avenue having been duly opened, regulated and paved for public use. At the trial, the plaintiff was examined as a witness in his own behalf, the defendants' counsel objecting thereto. It appeared from his testimony, that on going to his home from work at about 10 o'clock at night, he was walking up the Eleventh avenue, on the sidewalk, with his hands in his pockets, and when near Thirty-first street he pitched forward into a hole in the sidewalk, breaking his shoulder and two of his ribs. The hole was ten feet by seven in width, and five feet in depth. He was taken to the hospital, and although his bones had joined and mended, yet he was stiff, and at the time of the trial, which was more than a year after the accident occurred, he was unable to lift his arm. Being a machinist by trade, this naturally affected his ability to work and earn a livelihood, as he had been previously in the habit of doing. Before the injury he was able to earn from $16 to $20 a week, but now could not earn over $8 or $10 during the same time. It appeared that the plaintiff had been in a public hospital, and had paid or incurred no personal expense for his medical attendance.

No witnesses were examined for the defence, but the following ordinances of the defendants were offered and read in evidence:

"An ordinance providing for the repairs of the pavements of the sidewalks of the streets and avenues of the city of New York," passed December 29, 1853.

Sec. 1. "That the owner or owners, lessee or lessees, occupant

or occupants of any house or other building, or vacant lot fronting on any street or avenue, shall at his, her or their charge and expense, well and sufficiently pave, according to the ordinances, and keep and maintain in good repair, the sidewalks, and curb and gutter of such street or avenue, in front of any such house or other building, or vacant lot."

Sec. 2. "Upon complaint being made to the street commissioner, to his satisfaction, that any sidewalk, and curb and gutter, or either, are not paved or repaired according to the ordinances, it shall be lawful for the street commissioner to cause a notice to be served upon the owner or owners, lessee or lessees, occupant or occupants of any such house or other building, or vacant lot of ground fronting on any street or avenue, to repair or relay, as the case may require, the sidewalk, and curb and gutter, or either, in front of the same, within ten days after the service of such notice."

Sec. 3. "In default of such owner or owners, lessee or lessees, occupant or occupants, repairing or relaying, as the case may require, such sidewalks and curb and gutter, or either, within the time required by said notice, and complying with the said notice, it shall be lawful for the street commissioner to order the same to be done, and in case the expense thereof shall not exceed the sum of $250, to appoint such person or persons to do the same as he shall deem proper; and in case such expense shall exceed the aforesaid sum of $250, the same shall be done by contract, according to the ordinances."

Also the following sections from the revised ordinances of the defendants:

Sec. 22. "In all streets in the city of New York, of the width of forty feet and upwards, which are paved, or shall hereafter be paved or repaved, the sidewalks or footwalks, between the lines of the streets and kennels, shall be of the following width, that is to say: 1. In all streets forty feet wide, ten feet. 2. In all streets fifty feet wide, thirteen feet. 3. In all streets sixty feet wide, fifteen feet. 4. In all streets seventy feet wide, eighteen feet. 5. In all streets eighty feet wide, nineteen feet. 6. In all

streets above eighty feet, and not exceeding one hundred feet, twenty feet. 7. In all streets of more than one hundred feet, twenty-two feet and no more."

Sec. 23. "In all streets less than forty feet in width, such proportion thereof, as may be directed by the street commissioner, shall be used and flagged for sidewalks or footpaths."

Also the charters of the defendants.

The defendants' counsel then moved to dismiss the complaint on the following grounds:

1. That no cause of action had been shown against the defendants. 2. That the ordinances of the defendants cast upon the owner, occupant, or lessee of the lots fronting upon the streets in question, the duty of paving and keeping in repair the sidewalks in front of their lots. 3. That such owners, occupants, or lessees were alone responsible to the plaintiff for any injury which he had sustained through any defect in the sidewalk. 4. That the hole in the sidewalk into which the plaintiff fell did not appear to have been dug by the consent of the defendants. 5. That the case presented merely a violation of the ordinances of the defendants, by the owners, occupants, or lessees of the lot fronting on the street in the avenue in question, for which violation the defendants are not liable. 6. That no knowledge of the existence of the hole in question was brought home to the defendants, or to their officers. 7. That it does not appear that the hole in question arose from a neglect to repair the sidewalk on the part of the defendants. The court denied the motion, and the defendants excepted.

The cause was summed up by the counsel for the parties, and the court charged the jury: That it was the duty of the defendants to keep the streets of the city in repair, so that they might be safely traversed, at all times, by citizens or others; and that it was their duty, while making such repairs, to surround the locality, when necessary, by safeguards, so as to prevent injury to any person therefrom. That there were certain cases in which, when a contractor was performing work for the defendants, and injuries were sustained by his negligence,

the defendants would not be liable for such injuries, but that this was not one of those cases. That the questions for the jury to determine were: 1. Was the plaintiff guilty of negligence which contributed to the production of the accident? If he was, then he was not entitled to recover. If he was not guilty of such negligence, then the jury must consider whether the defendants were guilty of negligence, and if they were, then what amount of damages the plaintiff had sustained. That in estimating the damages, they might allow compensation for the pecuniary loss which he had sustained, if any, and the pain and suffering to which he had been subjected. And further, if the jury should determine that the defendants, in permitting the hole in question to remain as it was when the plaintiff fell into it, were guilty of gross negligence, they were at liberty to give the plaintiff exemplary damages.

The counsel for the defendants then asked the judge to charge as follows: 1. That the defendants are not liable for every act of negligence of their servants. The judge refused, and the defendants excepted. 2. That the defendants are not liable for any act of negligence occasioned by their servants, unless notice of the subject has been brought home to the knowledge of the corporate officers. The judge refused, and the defendants excepted. 3. That the defendants are not liable, unless more than a reasonable time has elapsed between such notice and the accident to allow the street or highway to be repaired. The judge refused, and the defendants excepted. 4. That notice to the said defendants is an affirmative fact which must exist, and be proven, before the law gives a right to recovery. The judge refused, and the defendants excepted. 5. That the hole in question, being on the sidewalk, the plaintiff cannot recover. The judge refused, and the defendants excepted. 6. That as matter of fact, the night being dark, the plaintiff's walking with his hands in his pockets might have contributed, and ordinarily would contribute, to the accident. The judge refused, and the defendants excepted. 7. That it is the duty of the owner, occupant or lessee of the property fronting on the street, to keep

and maintain the sidewalks and curb and gutters in repair in front of their property, and that for injuries resulting from a neglect to make such repair the defendants are not liable. The judge refused, and the defendants excepted. 8. That if the plaintiff is entitled to recover at all, he is only entitled to recover for the damages which he sustained as a legitimate and direct result of the accident. The judge refused, and the defendants excepted. 9. That the plaintiff is not entitled to recover punitory or vindictive damages. The judge refused, and the defendants excepted. 10. That in this case there is no evidence at all that the plaintiff has expended any money about his cure, and none which would enable the jury to form a correct estimate of how much, if any, pecuniary damages the plaintiff ought to be allowed for any pain he suffered. The judge refused, and the defendants excepted.

The jury rendered a verdict in favor of the plaintiff for $500, and judgment was entered thereon.

A motion for a new trial having been made and denied at special term, the defendants appealed.

Abraham R. Lawrence, Jr., assistant corporation counsel, for the appellants.

I. The plaintiff should have been excluded from testifying. *a.* The Code, (§ 399), as amended, was clearly intended to admit the testimony of one party to a suit, only when the adverse party is living and capable of testifying in his own behalf *b.* The defendants are not, within the meaning of the section, a living party. *c.* The effect of admitting the testimony of the plaintiff, is to enable a party to put his own coloring upon the case, while the other party is, from the nature of things, excluded from rebutting that testimony.

II. The motion for a dismissal of the complaint should have been granted. *a.* The ordinances of the defendants impose upon the "owners, occupants, or lessees of the lots fronting upon the streets of the city, the duty of paving and keeping in repair the sidewalks in front of their lots." *b.* The defendants were au-

thorized by their charters to pass such an ordinance, and it was a proper exercise of their governmental power. Charter of Montgomerie, § 14, (Kent's ed., 1854), p. 94. *c.* The case, therefore, presents merely a violation of an ordinance of the defendants by the parties owning or occupying the lots fronting upon the sidewalk in question; and for the injuries sustained by individuals from such a violation, it is well settled that the defendants are not liable. *Levy* v. *Mayor*, 1 Sand. 465; *Griffin* v. *Mayor*, 5 Seld. 456; *S. C.*, opinion SANDFORD, J.

III. The principle established in the case of *Hutson* v. *The Mayor*, is not applicable to this case, because, 1st. There is no legal evidence showing that the place at which the plaintiff was injured was ever laid out or opened as a public street, or that the defendants had control thereof. 2d. It does not appear that the hole in question was caused by a neglect of the defendants to repair the sidewalk. 3d. In Hutson's case, the injuries of which the plaintiff complained were occasioned by a neglect of the defendants to repair the carriageway of the street, which had been out of order for a long time; and it did not appear that there was any ordinance of the defendants imposing the duty of making such repairs upon private individuals. 5 Seld. 163. 4th. The evidence in Hutson's case showed that the excavation into which the plaintiff fell had been in existence for such a length of time as would justify the court in presuming that the corporation had notice of its existence. In this case, no notice of the existence of the hole into which plaintiff fell was brought home to defendants.

IV. The judge erred in refusing to charge, that notice to the defendants of the existence of the hole, and the lapse of a reasonable time between such notice and the accident, to allow the defendants to repair the same, must be shown, to entitle the plaintiff to recover. *a.* The charters of the defendants only allow them to have work performed when the expense exceeds a certain amount ($250), by contract, made after an advertisement for ten days, &c. If the plaintiff can recover without proof of notice and neglect to repair, then, while the charter of

1853 prohibits expenditures beyond $250, without advertisement, the law would render the defendants liable for not doing an illegal act. *b.* Besides, the ordinances of the defendants only authorize the street commissioner to order the sidewalks to be paved or repaired after complaints have been made to him that the same are out of repair, and after he has notified the owners, &c., of the lots, &c., to pave or repair the same, and they have neglected so to do. There can be no dispute about the power of the defendants to pass the ordinance. Montgomerie Charter, § 14. The defendants are not bound to see, at their peril, that all their ordinances are enforced. *Levy* v. *Mayor*, 1 Sand. 465; *Griffin* v. *Mayor*, 5 Seld. 456. And until complaints are made, or notice given to the street commissioner, there is no neglect of duty, on the part of the defendants, for which they are liable to respond in damages.

V. The learned judge erred in refusing to charge as requested, that "if the plaintiff is entitled to recover at all, he is only entitled to recover for the damages which he sustained as a legitimate and direct result of the accident," and that "the plaintiff is not entitled to recover punitory or vindictive damages," as in the 8th and 9th propositions of defendants' counsel. *a.* There is no malice or moral wrong shown on the part of the defendants. *b.* In such cases the jury cannot give anything beyond compensation for the actual loss sustained by the injured party. Sedgwick on Damages, 82; *Clark* v. *Brown*, 18 Wend. 213, 229; *Butler* v. *Kent*, 19 John. 228.

VI. The damages to which the plaintiff is entitled, (if entitled to recover at all), being confined strictly to actual compensation for the loss which he sustained by the injury, and there being no evidence as to the amount which he expended for his cure, nor any evidence by which the jury could measure such expense, the defendants were entitled to have the jury instructed, as requested in the 10th proposition

F. H. B. Bryan and Daniel W. Clarke, for the respondents.

I. The intent and meaning of the statute regarding the exam-

ination of a party in his own behalf, applies, where corporations are defendants, as it does to individuals. Every party interested in a corporation can be equally examined against the plaintiff.

II. The charge of the judge was not excepted to by the defendants. They cannot, therefore, avail themselves of a refusal generally to charge further. The request to charge must be to supply some error in the original charge.

III. Notice to the corporation was not necessary; the fee of the public highways or streets is vested in them. A tax is levied to keep them in repair. The defendants were bound to keep them in repair without notice. The ordinance requiring the sidewalk to be repaired by the owners, does not excuse the defendants from keeping it in repair, if not done by such owners. A bridge or highway, built by an individual, must be kept in repair by the public. 23 Wend. 446; 2 East, 342. The streets are in fact public highways, opened by the corporation, and in their possession, to be repaired and kept by them. The ordinance is for their benefit. The public who are injured by the neglect of the defendants, are not deprived of their remedy. The only notice required is by the corporation to the owners of the houses, before they can call on such owners to repair the sidewalk.

IV. There was no proof, on the part of the defendants, that any sidewalk had ever existed where the accident occurred.

V. The damages were moderate, considering the injury inflicted on the plaintiff. The defendants were properly held liable for a gross neglect of public duty.

By the Court, DALY, First Judge.—The first question in this case is whether the plaintiff could be examined as a witness in his own behalf, in an action against the corporation of the city of New York. By the 399th section of the Code, the examination of a party as a witness on his own behalf is conditional. It can be had where the adverse party or person in interest is living, unless the opposite party is the assignee, administrator, ex-

ecutor, or legal representative of a deceased person. It is objected that the defendants here are not, within the meaning of the section, a living party, but an artificial body, created for certain political and governmental purposes, and that the effect of admitting the testimony of the plaintiff in this case, is to enable a party to put his own coloring upon the case, while the other party is, from the nature of things, excluded from rebutting that testimony. That the intention of the legislature was to give each an equal chance for placing the court in possession of the facts relied upon by him for complaint and defence; not to give one party an advantage over the other in that respect.

The defendants may, in my judgment, be regarded as a living party within the meaning of the section. The chief distinguishing attribute of a corporation is its power of continuous duration, unaffected by the death, incapacity, or change of its members. As Lord COKE expresses it, "it is not subject to imbecilities or death of the natural body, for a corporation aggregate of many is invisible, immortal." *Case of Sutton's Hospital*, 10 Coke R. 32 b. It is calculated for and capable of duration forever, where no limitation is fixed by the act that creates it, though it may be brought to a termination by accident, or by certain defaults of duty on the part of its members, at any period; but however long its duration, the corporation always continues the same, and the same rights, privileges, duties and liabilities attach to it as it had at the first moment of its creation, precisely as though it was an individual. Grant on Corporations, 3. It is so far considered to have a personality of its own, that the word person, in statutes, has often been construed to include corporations. *The Dean and Chapter of Bristol* v. *Clark*, 1 Dyer, 83 b; 2 Coke's Inst. 722; *Cortes* v. *Kent Waterworks Co.*, 7 B. & C. 314; *Boyd* v. *Craydon Railway Co.*, 4 Bing. N. C. 669; *Attorney General* v. *Newcastle*, 5 Beavan, 307; 1 Reeves' History of the English Law, 76, 79. It may sue or be sued; and, as it has this unbroken personality and power of perpetual succession, it may, without any violation of language, be referred to and embraced in a statutory designation of a living party. Nor will this construc-

tion have the effect of allowing one party to give testimony which the other is necessarily excluded from rebutting, or defeat the intention of the legislature by not giving each party an equal chance of testifying. The parties defendant to this action are the mayor, aldermen and commonalty of the city of New York, by their corporate name or title, who are, and always were, together with their officers and agents, competent witnesses in an action in which the rights or liabilities of the corporation are in controversy. *Van Wormer* v. *The Mayor, Aldermen and Commonalty of the city of Albany*, 15 Wend. 262; *Watertown* v. *Cowen*, 4 Paige, 510; *Ex parte Kip*, 1 id. 613; *Falls* v. *Bellknapp*, 1 Johns. 486; *Corwin* v. *Haines*, 11 id. 76; *Bloodgood* v. *Jamaica*, 12 id. 285; Code, § 398. And this applies not merely to the members of municipal, but also to private corporations, the members or stockholders of which were formerly inadmissible as witnesses by reason of their interest; a disqualification which no longer exists. The defendants, therefore, in this action, could avail themselves of every right that any other defendant could have, and even more, as they could all be examined as witnesses whether the plaintiff offered himself as a witness or not.

The corporation are bound to keep the streets and avenues of the city in such repair that they may be safely traveled, when they are opened for public use, and if they negligently suffer them to get out of repair, they are liable for any injuries that may happen to persons through such negligence. *Hutson* v. *The Mayor, &c., of New York*, 5 Seld. 163; *The Mayor, &c., of the city of New York* v. *Furze*, 3 Hill, 612; *The Rochester White Lead Co.* v. *The City of Rochester*, 3 Comst. 464. The evidence was sufficient to warrant the jury in finding that the plaintiff was walking, at the time of the accident, through an avenue open for public use. He was walking up the Eleventh avenue at 10 o'clock at night, when, at the corner of Thirty-first street, he pitched forward into a hole in the sidewalk, ten feet wide, seven feet across, and five feet deep, and was severely injured.

The corporation have provided, by ordinance, that the sidewalks shall be paved and kept in good repair by the owners,

lessees, or occupants of the houses or lots fronting on any street or avenue, under a certain penalty, and if they neglect to do so, it is to be done by the corporation at the expense of the owners, lessees or occupants, in the manner provided by the ordinance. Upon complaint made to the street commissioner, he is to notify the owners, &c., and if they do not repair within a certain time, he is to have it done, if the expense does not exceed $250, and if it exceeds that sum, it is to be done by contract in the manner provided by ordinance. The sidewalk is a part of the public street, designed for the use of those who travel on foot, and though the corporation may impose upon the owners of lots fronting upon the streets or avenues, the burden of paving and keeping the sidewalks in repair, they do not thereby relieve themselves of the duty imposed upon them by charter and by statute, of "altering," "amending," and "keeping in repair" the streets and highways within the city. Kent's Charter, 15, 99, 235, 237; Laws of 1813, ch. 86; 2 Rev. Laws, 407, § 175. *Wilson* v. *The Mayor, &c., of New York*, 1 Denio, 601. And if they suffer, as in this instance, a part of the public highway to remain out of repair in so exposed and dangerous a state, that a passenger, without any negligence on his part, drops, at night, into a pitfall in the sidewalk, and is injured, they must answer to the injured party for the damage occasioned by their negligence.

Their liability for the neglect of a duty like this, to keep the public streets in repair, which is imposed upon them by statute, is distinguishable from cases where the streets are obstructed by the acts of others, as in *Griffin* v. *The Mayor, &c., of New York*, (5 Seld. 457), where parties erecting buildings suffered piles of rubbish to encumber the street, which led to the accident, for which the corporation were sought to be made liable; or *Levy* v. *The Mayor, &c.*, (1 Sandf. S. C. R. 465), wherein they were sought to be made liable for an accident caused by swine running at large in the streets, in which cases they could not be held liable for negligence until they were notified or advised of the obstruction, and had neglected to cause it to be removed.

I think, however, that the instruction to the jury that they might give exemplary damages if they thought that the corporation was guilty of gross negligence in suffering the hole to remain in the condition it was, was erroneous, and that the defendant was entitled to have the jury instructed as he requested, that the plaintiff could recover only for such damages as were the legitimate and direct result of the accident, and that he was not entitled to recover punitory or vindictive damages. For all that appeared in the evidence, the hole in the sidewalk may have been the work or act of a private individual, in no connection with the corporation, and there was nothing in the evidence to show that the corporate authorities were notified of it or had any knowledge of its existence. The recovery of punitory or vindictive damages is allowed only where the act causing the injury has been willfully done; where the circumstances show that there was a deliberate, preconceived, or positive intention to injure, or that reckless disregard of the safety of person or property which is equally culpable. The evidence in this case would not warrant the jury in forming any such conclusion as respects the corporation. It may be doubted if the instruction had any injurious effect, as the damages found by the jury were very moderate under the circumstances. Still we cannot say that it had not, and will therefore, though reluctantly, be compelled to order a new trial.

Judgment reversed and new trial ordered; costs to abide the event.

NOTE.—On a second trial of this case, in January, 1860, before Judge HILTON, substantially the same facts were established, and under a charge given in conformity with the views expressed by the general term, the jury, after a short deliberation, rendered a verdict for the plaintiff of $5,000, which, upon motion subsequently made, was set aside as excessive, and a new trial ordered, unless the plaintiff stipulated to reduce his recovery to $2,500. This was done, and the case settled.

WILLIAM HOWE *v.* DENIS JULIEN.

No appeal lies to this court from a decision given at a general term of the Marine Court, merely reversing a judgment in favor of the plaintiff.

Such a decision is not a final determination of the rights of the parties to the action.

That court at general term may reverse, affirm or modify the judgment appealed from, and upon a reversal may order a new trial, or may give final judgment for the defendant when it is apparent that upon no possible state of proofs can the plaintiff recover.

But where the judgment is reversed because the evidence at the trial was insufficient to sustain it, and it is not perfectly clear that the deficiency cannot be supplied, a new trial should be awarded.

APPEAL from the general term of the Marine Court. On the trial in that court, before a justice, the plaintiff had judgment, which, upon appeal to the general term, was reversed, without awarding a new trial. The case showed that the reversal was upon the ground that the evidence at the trial was insufficient to sustain the judgment of the justice, but it was not apparent that the deficiency in the proofs might not be supplied upon a new trial. The plaintiff appealed to this court.

Jonas B. Phillips, for the appellant.

Thomas E. Stewart and D. Jones Crain, for the respondent.

By the Court, HILTON, J.—Upon the trial of this action before one of the justices of the Marine Court, judgment was rendered for the plaintiff. The defendant appealed to the general term of that court, where the judgment was reversed; and from this decision of the general term, reversing the judgment *generally, and without awarding a new trial*, or in any way determining the rights of the parties to the action, an appeal is brought by the plaintiff to this court.

It is prescribed by the Code (§ 352,) that when a judgment shall have been rendered by the general term of the Marine

Court, the appeal shall be to this court, but it shall only "be from an actual determination at such general term." And as a judgment is defined, by § 245, to be "the final determination of the rights of the parties in the action," it seems quite clear that this case is not in a condition to be brought before us for review.

There has been no actual or final determination of the rights of the parties by the Marine Court, and until such a determination is had, and the case is at an end in that court, it cannot be brought here, it being the policy of the Code to allow only one appeal to us in the same action. Such was the construction given by the Court of Appeals to similar language used in the the Code (§ 11,) respecting appeals to that court, (*Swartwout* v. *Coutes*, 4 Comst. 415; *Duane* v. *Northern RR. Co.*, 3 id. 545; *Paddock* v. *Springfield Fire and Marine Ins. Co.*, 2 Kernan, 591), and we have repeatedly held in cases like the present, where the judgment has been reversed on appeal, that the Marine Court were clearly wrong in not awarding a new trial; and in many instances appeals have been dismissed, or the returns sent back, with directions to that effect.

That court has, at general term, all the powers, in reviewing a judgment brought before it on appeal, that a general term of the Supreme Court has in like cases. It may reverse, affirm, or modify the judgment, and in case of reversal may order a new trial, or instead may give final judgment in favor of the defendant, where it can see that no possible state of proof applicable to the issues in the cause will entitle the plaintiff to a recovery, (*Figaniere* v. *Jackson*, 11 Howard P. R. 462; *Edmonston* v. *McLoud*, 16 N. Y. Rep. 543; *Griffin* v. *Marquardt*, 17 id. 28), although, in the language of Judge COMSTOCK in the latter case, (p. 33), "it is proper to say, and to say it with great distinctness as the opinion of this court, that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is entirely plain, either from the pleadings or from the very nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit."

I have no hesitation, however, in adding that this is not a case in which such a final judgment should be given. The evidence at the trial may not have been sufficient in law to sustain the judgment, yet it was impossible for the appellate court to know that the necessary proof might not be supplied on another trial, and which it was their duty to order. The appeal must be dismissed, and the return sent back to the Marine Court, that the proper judgment may be there given.

Ordered accordingly.

The Fire Department of the City of New York *v.* Joseph Harrison.*

An action to recover damages or a statute penalty, for creating or continuing a nuisance, must be tried by a jury, unless a jury trial is waived.

Actions of such a nature were triable by a jury prior to the constitution of 1846, and the right was preserved by that instrument. A jury trial cannot now be dispensed with in such cases, unless the parties consent thereto in the manner prescribed by law.

A suit was brought to recover statute penalties for the erection of certain buildings in the city of New York in violation of the act of 1849, for the more effectual prevention of fires. On the case being called, the defendant demanded a jury trial, which the judge presiding refused, and the action was thereupon tried by the court without a jury; *Held*, erroneous.

In such a case a jury could not be dispensed with, without the consent of the defendant.

Appeal, by the defendant, from a judgment at special term, upon a trial by the court without a jury.

The action was brought against the defendant, as owner of what are alleged in the complaint to be "four dwelling houses or buildings," on the southerly side of Jane street, between Greenwich and Washington streets, in this city, for the recovery of a penalty for violation of the 2d, 3d, and 5th sections of the act entitled "An act for the more effectual prevention of fires in

* Judge Hilton, having been counsel in this case, took no part in its decision.

the city of New York, and to amend the acts heretofore passed for that purpose," passed March 7th, 1849, the violation alleged being that each of said four dwelling houses or buildings were erected and continued without an outside or party wall of stone or brick on one side of each of said dwelling houses or buildings respectively. The defendant, in his answer, alleged that he was the owner of two dwelling houses, situated on the southerly side of Jane street, each of a width not exceeding thirty feet, and each having outside or party walls on each side thereof, of stone or brick, and not less than twelve inches in thickness; and denied that he was the owner of four or any buildings situate as aforesaid, which have been erected or continue in violation o said sections of the act. The case was tried before Judge INGRAHAM, at a special term, without a jury, (the defendant objecting, and claiming a trial by jury).

The finding of the court was as follows:

I find as to the facts, that the defendant is the owner of the buildings. That they were erected under his order and on his account, after the year 1850. That the buildings so erected are four separate and distinct houses. That two of the partition walls are erected of studs, and not of brick or stone, and are a violation of the fire laws passed relative to the city of New York. That on the 9th March, 1852, the fire wardens gave the necessary notice to remove the same, and that such notice has not been complied with; but that the partitions still remain; and I find as matter of law upon these facts, that the defendant is liable to the penalty of $500, for erecting each of such buildings, in violation of law, and the further sum of $50 for each twenty-four hours, from 9th March, 1852, for not removing the same after notice so to do was served upon him. As the plaintiffs do not claim the whole penalty, judgment is given for the plaintiffs for $5,000. The plaintiffs also are entitled to a decree, that the nuisance be removed. To which decision and finding of the judge, the defendant duly excepted.

Upon the argument, the case was fully discussed upon the merits, and also upon exceptions taken to the rulings of the

judge in excluding evidence offered by the defendant at the trial, but as the decision at general term rested upon the first point presented by the counsel for the appellant, the others became immaterial, and are not, therefore, presented.

Malcolm Campbell, for the appellant.

The court erred in refusing to grant to the defendant a trial by jury.

Augustus F. Smith, for the respondents.

I. The constitution preserves trial by jury in all cases in which it has been heretofore used, (§ 2, art. 1). The Court of Chancery always had jurisdiction, in cases of nuisance, to restrain or to remove. 2 Story Eq. Jurisp. § 925, &c. When a court of chancery has obtained jurisdiction for one purpose, it will retain it generally. *Rathborn* v. *Warren*, 10 J. R. 587; *Hawley* v. *Cramer*, 4 Cow. 718, 728.

II. One ground of relief in equity always was to prevent multiplicity of suits. 1 Story Eq. Jurisp. 64, 65. In *College* v. *Bloom* the court say they will, to prevent multiplicity of suits in an action for an injunction to prevent waste, give the plaintiff damages for waste already committed. 3 Atk. 262, 263. Clearly, then, before the Code, these houses, being a nuisance under § 26 of the Fire Law, the Court of Chancery would have had jurisdiction to restrain their erection, and to direct their removal; and, having jurisdiction for that purpose, the court would have retained it for all purposes.

III. The two causes of action are properly joined. (Code, § 167, subd. 1. The objection is not that the court had not jurisdiction to try that part of the action which claimed a penalty, but was general, that the case (the whole case) should be tried by a jury. If a party take a general objection to a charge, and one proposition is erroneous, and the other right, the exception is of no avail. *Hart* v. *The Rensselaer RR. Co.*, 4 Seld. 37 43; *Howland* v. *Willetts*, 5 Seld. 171

BRADY, J.—This action was brought to recover penalties in curred by the erection of four buildings in violation of the fire laws, particularly designated in the complaint, and for the judgment of the court, in accordance with the provisions of the statute, that the several houses be taken down and removed. When the cause was called at the special term, the plaintiffs' counsel moved that it be tried by the court without a jury. The defendant's counsel claimed a trial by jury. The judge presiding decided that the action should be tried by the court without a jury, and the defendant excepted. This presents the first question on the appeal.

The Code (§ 253) provides that an issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived, as provided in section 266, or a reference be ordered, as provided by sections 270, 271. Section 256 provides that every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury, and rule 69 of the Supreme Court, in force when this action was tried, and which stated the practice under this section, declared that in cases where the trial of issues of fact was not provided for in section 253 of the Code, if either party should desire a trial by jury, such party should, within ten days after issue joined, give notice of a special motion to settle the issues; and that the court or judge might settle the issues, or might refer the settlement of them to a referee. This is not one of the class of cases to be tried by a jury, specifically mentioned in section 256. It is not for the recovery of money only. It is to recover penalties, and for the removal of buildings erected in violation of law, and no application was made for a jury trial, in conformity with rule 69, *supra*. Unless, therefore, the constitutional right of trial by jury has been violated, the defendant was not entitled to a trial in that mode. The constitution (§ 2, art. 1, adopted 1846) provides that the trial by jury in all cases in which it has been heretofore used, shall remain inviolate for-

ever. But that a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The Code (§ 266) provides that the trial by jury may be waived by the several parties to an issue of fact in all actions on contract, and with the assent of the court in other actions in the manner following: 1. By failing to appear at the trial; 2. By consent in person or by attorney, to be filed with the clerk; and 3. By oral consent in open court, and entered in the minutes.

The defendant having appeared at the trial, and not having consented, the trial by jury was not waived in the manner prescribed by law, and it therefore remains to be considered, whether this action is one in which a trial by jury was in use prior to the constitution of 1846. By the 26th section of the "Act for the more effectual prevention of fires in the city of New York," &c., passed March 7, 1849, (Laws of 1849, p. 118), every dwellinghouse, store, storehouse, ashhole, ashhouse, shed, or other building of any description whatever, mentioned before in that act, which shall be erected, built, roofed, repaired, altered, enlarged, built upon, or removed, contrary to any of the provisions of the act contained in the preceding sections, is declared to be a common nuisance; and the justices of the Supreme Court, and the justices of the Court of Oyer and Terminer, and general jail delivery, and the justices of the Court of General Sessions of the Peace, within the city of New York, have cognizance of the offence, and are empowered, upon conviction, to adjudge such fines and penalties as they, in their discretion, shall think fit and proper, and also, in their discretion, to cause such nuisances to be abated and removed. By the 30th section of the same act, the Supreme Court of the state of New York, and the Court of Common Pleas for the city and county of New York, in addition to the power of enforcing the penalties provided by law, and by the act, for a violation of the provisions of the statute, are endowed with power to restrain, by injunction, the further erection of a building, in an action to be brought by the fire department, and to adjudge and decree that a building erected in violation of the statute shall be taken down and removed, the statute im-

posing only, as a preliminary to the exercise of this jurisdiction, that ten days' notice to remove the violation shall be given. The nuisance, it will thus be perceived, and the penalty and forfeiture incurred, are declared by statute. The erections which the statute was designed to prevent, would not be nuisances at common law, *per se*, and the consequences of a violation of the provisions of the law on the subject, are those only which are prescribed. None of the acts of the legislature, prior to the act of 1849, in terms conferred power upon the courts in an action at law, not only to enforce the penalty, but to adjudge that the violation be taken down and removed or abated. Some of them contained a provision, declaring the violations a common nuisance, and authorized the courts, on indictment and conviction, to abate and remove them. Act April 9, 1813, §§ 60, 62, 63; Act April 11, 1815, §§ 2, 4, 5; Act April 12, 1822, §§ 3, 4; Act April 9, 1823, § 2; Act March 21, 1827, § 2; Act May 1, 1829, § 2; Act April 20, 1830, §§ 17, 22; Act April 30, 1834, § 8.

This action, therefore, if determined by the judgment asked, was not one in use when the constitution of 1846 was adopted, nor was the provision violated contained in any statute in existence at that time. It is true that the common law remedy by writ of nuisance was retained, subject to the provisions of the statute. 2 Rev. Stat. 333, second edition. In that proceeding the jury, if the court so ordered, could view the premises, and if the plaintiff prevailed, the judgment followed that the nuisance be removed, and that he recover his damages. So, in all actions founded upon damages resulting from a nuisance, the trial by jury prevailed. There was a distinction, however, between a common and a private nuisance. On account of the former no action would lie by an individual unless he suffered some extraordinary damage beyond the rest of the people, or some peculiar or special injury, in which case he should have a private satisfaction by action. 3 Bl. Com 220; *Lansing* v. *Smith*, 4 Wend. 9, per WALWORTH, Ch.; Willard's Eq. 339; *Penniman* v. *N. Y. Balance Co.*, 13 How. Pr. R. 40; *Hecker* v. *Same*, id. 549.

The statute of 1849 is a remedial statute, in the nature of a

police regulation, designed for the protection of life and property, and the penalties imposed for a violation of it are given to the fire department exclusively. The consequences of such violation may be highly penal. The accused, as we have seen, may be punished by fine, and his property destroyed, when the proceeding is by indictment; and when by action, the penalty may he recovered and the property destroyed. I do not think it necessary, in disposing of the exception taken, to consider how far it is affected by the constitutional provision, that no person shall be deprived of his property without due process of law, because I think it may be disposed of on the first constitutional right or privilege suggested. It is said by A. S. JOHNSON, J., in *Wynehamer* v. *The People*, (3 Kernan, 426), in reference to the first part of art. 1, § 2 of the constitution, viz.: "The trial by jury in all cases in which it has heretofore been used shall remain inviolate forever," that the expression "in all cases in which it has heretofore been used" is generic. That it does not limit the right to the mere instances in which it had been used, but extends it to such new and like cases as might afterward arise, and illustrates this view by stating that felonies were tried by a jury, and if a new felony were created, it must be tried in that way. The application of that principle disposes of the question in hand. A common nuisance is a misdemeanor, and indictable at common law, (Wharton's Cr. Law, 4), but the indictment was not triable in the Special Sessions, (2 Rev. Stat. 711, § 1; id. 714, § 22); and when an action was brought by an individual to recover damages resulting from a common nuisance, the action proceeded according to the course of the commen law, and there was a trial by jury. The violation complained of in this action is declared a common nuisance, and the statute declaring it has not prescribed the mode of trial. The rule, applicable to an action by an individual for damages occasioned by a common nuisance, would apply to a trial to recover a penalty imposed by the statute, at which the defendant would be entitled to a jury in a justice's court, if demanded. Act of 1813, vol. 2, Revised Laws, 870, § 95; 2 Revised Statutes, 242, § 93. And at all events, in

a court of record, proceeding according to the course of the common law. 2 Rev. Stat. 409, § 4. This action, then, regarded as one at law to recover a penalty or to remove a nuisance, is an addition to a class of offences and actions well known and defined, and in which the mode of trial was by jury, and was well known and in use prior to the constitution of 1846. It is no answer to the conclusion thus expressed that the Court of Chancery had jurisdiction to restrain and abate a nuisance, and that having acquired jurisdiction for any purpose, that court retained it generally. The power of the Court of Chancery to interfere in cases of nuisance cannot be doubted, although it is stated as an elementary rule, that in many of the cases indictable as common nuisances, courts of equity have no cognizance, (Willard's Equity, 389; Eden on Injunctions, 160); and it seems that the relief in equity was confined to the restraint or abatement of the nuisance. A prayer for damages would be stricken out. *Brady* v. *Weeks*, 3 Barb. S. C. Rep. 157. The courts did not always interfere in cases of common nuisance. The Court of King's Bench, in *Rex* v. *Justices of Dorset*, (15 East. 594), refused to interfere, and left the party to his remedy by indictment. These authorities are referred to not for the purpose of questioning the power of the Court of Chancery, where its interposition was asked in cases of nuisance, but to show that there was a distinction between common and private nuisances recognized in that court. But conceding this power in cases of nuisance, public and private, the history of that jurisdiction, and all the cases wherein it was employed, will show that it was exercised by injunction, and on bills filed expressly for the purpose of obtaining that process, (2 Story's Eq., §§ 923, 924, 925; Eden on Injunctions, 157; Willard's Eq. Jur. 388); and there are no instances to be found in which the Court of Chancery had assumed jurisdiction to abate a nuisance, and decree a penalty or damages for its creation. As we have seen, (*Brady* v. *Weeks*, *supra*), the Supreme Court of this state, acting as a court of equity, struck out the prayer for damages as multifarious.

I think it may also be said of this and kindred actions, that

they are not in their nature such as would induce the interference of a court of equity. The plaintiffs have not suffered any injury, special or peculiar, and the building itself would not, as such, occasion injury to the plaintiffs. *Penniman* v. *New York Balance Company; Hecker* v. *Same, supra.* The nuisance is neither prejudicial to health nor offensive to the senses, and does not present any of the features of a nuisance known to equity or the common law. But without further pursuing this view, there are considerations which claim our attention, and which arise from the pleadings and the statute in reference to which they were framed. The plaintiffs claim a penalty and the removal of the nuisance. They do not ask for an injunction, and none in fact was necessary. The buildings had been erected when the action was commenced. The mischief was done, and there was no reason or ground for an injunction. An injunction would have accomplished nothing, and would not have been granted on the complaint. There was nothing to restrain. The action is in form, therefore, an action at law in which, by the statute, the plaintiffs are entitled, on proving the complaint, to double relief, viz.: judgment for the penalty claimed, and that the nuisance be removed. The complaint does not seek the aid of equity jurisdiction, and there is nothing in the case which calls for its interposition. The judgment demanded and rendered would not have been granted by a court of equity prior to the constitution of 1846.

There is nothing in the complaint and nothing in the case which, in either branch of it, necessarily forms the ground of equity jurisdiction, and when that is the case, the right of trial by jury is absolute and cannot be denied, (*Greason* v. *Keteltas*, 17 N. Y. Rep. 491), while the whole scope of the action is certainly not of equity cognizance. Having thus considered the complaint and the case made, if we turn to the statute of 1849, (*supra*), we find that the power to restrain in these cases thereby given, is not conferred upon the Supreme Court and this court as courts of equity, but in addition to the power already possessed to enforce the penalty; which power to enforce the pen

alty was to be exercised according to the course of the common law, and by which course a jury trial was a right secured. The language of the statute shows that the intention of the legislature was to confer upon the courts named a special jurisdiction in actions to be brought by the plaintiffs for the recovery of the penalties imposed for violations of its provisions. If the penalty was in fact incurred, then the statute was violated, and a common nuisance proved to have been created. The court might then direct the building to be removed. The inquiry as to the penalty would necessarily determine the question of nuisance, and thus present to the court all the elements requisite for the judgment to be given. This comprehensive provision as to the judgment to be granted did not change the character of the action, but enlarged the relief to be granted. My conclusions are therefore as follows:

1. That although prior to the constitution of 1846, a court of equity had jurisdiction in cases of nuisance, and although this court possesses general law and equity jurisdiction, the complaint herein does not, by any averment made or relief asked, seek the aid of equity jurisdiction.

2. That in these actions this court acts as a court of law exclusively.

3. That if it does not so act, then this action is in form an action at law; and

4. That in either point of view the defendant was entitled to a trial by jury on all the issues presented.

The judgment should therefore be reversed

DALY, First Judge.—This is not a case in which a trial by jury could be waived, unless by the consent of the parties; nor does it come within the class of cases specified in the Code as triable by a jury; but it is nevertheless to be tried by a jury unless it is a case where the remedy sought is of an equitable nature, analogous to those of which the Court of Chancery would formerly take cognizance, and could alone afford the entire relief asked. It is not, in my judgment, a case of that nature or kind.

A court of chancery would not interfere where there was an ample remedy at law. It would interpose by injunction to restrain parties from creating or continuing a nuisance, because it could alone afford that remedy. If an erection was begun, which was or would become a nuisance, it would restrain the party from the further prosecution of the work, but it had no jurisdiction to compel him to undo what was done, unless the fact of the nuisance was established by an action at law. *Bradford* v. *The Manchester, Sheffield and Lincolnshire Railway Co.*, 8 Eng. Law and Eq. R. 143. In the case cited, the defendants commenced the erection of a wall by which the water was prevented from flowing up to the plaintiff's mill, which diverting or stopping off of water running to another's mill or meadow, is, by the common law, a nuisance. F. N. B. 184; 2 Eq. Abr. 522, pl. 3. Sir J. PARKER, the vice chancellor, granted an injunction to restrain the defendants from the further prosecution of the work, but said that he could not make them undo anything actually done. The instances of the interposition of the court upon the subject of nuisance, says Lord ELDON, in *The Attorney General* v. *Cleaver*, (18 Ves. 217), are very confined and rare; and he remarks further, upon the authority of Lord HALE, that the question of nuisance, whether public or private, unless it be the obstruction of a highway or of a harbor, is a question of fact, which must be tried by a jury, and that though the court might entertain a suit to abate a nuisance, it would be bound to try the fact by the intervention of a jury. But in *Willer* v. *Smeaton*, (1 Cox, 102), the court went further than this. It was a suit in equity to compel the defendant to pull down and remove certain works which obstructed the plaintiff's mill, and to restrain him from erecting new ones, and it was held that the bill would not lie, until the right was first established by an action at law.

This action is not to prevent or restrain the defendant from doing anything, but to compel him to take down and remove a building which he has erected, upon the ground that it is a nuisance, and to recover a statute penalty. A penalty is recoverable by an action at law, and it is very plain, upon the authority of

Willer v. *Smeaton*, that a bill in equity would not lie to compel the taking down and removal of a building as a nuisance, unless the fact of its being one was first established in an action at law. When the fact was ascertained by a recovery in an action at law, the court would lend its aid to compel its removal, as the plaintiff had no other remedy at law but to bring successive actions upon the case for damages, the assise of nuisance and the writ *quod permittat prosternere*, by which a nuisance might be removed, having been abolished by statute. But in this state there was a full and ample remedy at law, without resorting to a court of equity; as in the action of nuisance, under the Revised Statutes, the plaintiff had judgment, not only for his damages, but that the nuisance be removed; a provision which the Code has retained, (§ 454). He had no occasion to go into a court of equity, except in cases where it could alone afford relief by an injunction to prevent or restrain.

If the buildings owned by the defendant are in violation of the act of 1849, they are, by the statute, a common nuisance, and the defendant is subject to certain penalties for causing them to be erected. By §§ 25, 30, and 31, of the act, the penalty may be enforced in this court, or in the supreme court, by an action to be brought by the fire department, in which action the court may, in addition to giving judgment for the penalty, also adjudge and decree that the building be taken down and removed, which decree it is made the duty of the sheriff to execute. There is nothing in this action of exclusive equitable cognizance. It is to compel the removal of a common nuisance, and to recover a penalty incurred by creating it. The remedy sought by the removal of a nuisance was one that was obtainable in this state, when the Court of Chancery was in existence, by an action at law, in which full and adequate relief was afforded without resorting to a court of equity at all, and one that the English Court of Chancery would not grant, unless the existence of the nuisance was established by the judgment of a court of law; or, according to Lord ELDON, by the verdict of a jury. I therefore concur with Judge BRADY, that it is an action in which

a trial by jury could not be dispensed with, unless with the defendant's consent. The case cited by the plaintiff, (*Jesus College* v. *Bloom*, 3 Atk. 262), instead of being an authority for him, is directly against him. It is very true, that if a court of equity has acquired jurisdiction, that it will, to avoid multiplicity of suits, embrace other matters connected with or growing out of the subject, though they may be cognizable in courts of law, unless they embrace objects so diverse and different, as to be liable to the objection of multifariousness. Lord HARDWICKE consequently said, in that case, that where an injunction would be allowed to stay waste, and waste had been already committed, the court would decree an account and satisfaction for what was past, but he dismissed the bill because the plaintiff did not ask an injunction to restrain, but his bill was for an account and a satisfaction. There was, in that case, as it is in this, no element of equity jurisdiction, for the plaintiff could obtain all that he sought by an action at law.

Judgment reversed.

TIMOTHY F. QUINN *v.* ALBERT S. CASE AND OTHERS.

It is the settled practice of the courts to open a default arising from a failure to answer, on the defendant swearing to merits and paying costs.

A party is entitled to relief against the consequences of an irregularity in the service of a paper during the progress of a cause; but the terms upon which such relief will be granted, are in the discretion of the judge who hears the application therefor.

If an order refusing an application for relief, in effect determines the action, and prevents a judgment from which an appeal might be taken, it may be reviewed at general term, upon an appeal, as a matter of right.

But where an application for relief is addressed to the discretion of the judge hearing it, his decision cannot be reviewed, upon appeal, without a certificate, under the rule of this court, of March 22d, 1851.

APPEAL from an order, at special term, denying a motion for

leave to serve an answer. The action was commenced by the service of a summons and complaint. The complaint stated that the defendants were bankers, and that Edward McGuire, assignor of the plaintiff, opened an account, and had dealings with them, upon which defendants became indebted to him in a balance of $3,899.86, which they had refused to pay. It also alleged an assignment of this claim to the plaintiff.

Before the time to answer had expired, the defendants' attorneys procured an order extending their time. This order was served on the plaintiff's attorney, but was not accompanied by a copy of the affidavit on which it was granted. The plaintiff's attorney, on the expiration of the usual twenty days allowed for answering, served a notice of taxation of costs. The defendants' attorneys then applied, at special term, for leave to come in and defend. The motion was denied, and the defendants appealed.

It appeared by the affidavits read on the motion, that McGuire, the assignor of the plaintiff, had performed work in local improvements for the city of Hoboken. As the work progressed the officers of the city had, from time to time, issued to McGuire "improvement certificates," so called, of the city of Hoboken, in part payment. The certificates so issued, during the progress of the work, amounted in all to $5,390, and were payable by the treasurer of the city, in ninety days from their date. Upon the conclusion of the work for which McGuire was employed, he presented a bill of particulars of the whole, amounting to $8,909, but giving no credit for the partial payments previously made. Through mistake, the mayor and city clerk issued to McGuire further certificates for $8,909, instead of deducting the $5,390 paid, as they should have done. It was charged that McGuire knew of the error at the time of the last payment; and also that he was afterwards, and before the assignment of the claim in suit to the plaintiff, notified of the mistake and desired to correct it, which he promised to do, but did not.

On receiving the certificates in question, McGuire sold them to the defendants, receiving, from time to time, payments from

them on account of the purchase, but they, having been notified of the manner in which the certificates were obtained by McGuire, and that the city of Hoboken would contest them, withheld further payments. McGuire then assigned his claim upon them for the balance of the purchase money to the present plaintiff.

Denning & Husted, for the appellant.

James McGay, for the respondents.

By the Court, HILTON, J.—The defendants appeal from an order, made at special term, denying their motion for leave to serve an answer. It appears that before the time for answering the complaint expired, the defendants, upon a proper affidavit, obtained, from one of the judges of this court, an order extending the time to answer twenty days. This order was served on March 21, 1859, the day of its date, upon the plaintiff's attorney, but the service was not accompanied with the affidavit on which it was granted. It was for this reason disregarded, (Code, § 405), and notice of taxation was given of the plaintiff's costs, evidently preparatory to entering the judgment. Three days after the order was thus served, the defendants served a copy of the affidavit, but subsequently, fearing the plaintiff would disregard the order and enter judgment, they applied for leave to serve an answer, thus treating the case as one where the time to answer had expired, but no judgment entered.

The affidavits presented upon the motion show that the plaintiff, as assignee of one McGuire, sues to recover from the defendants, who are brokers, the balance due upon the sale by McGuire to them of certain improvement certificates of the city of Hoboken, which were issued by the city to McGuire under a mistake, and were received by him with a full knowledge that he was in no way entitled to them. Or, to state the facts with more distinctness: McGuire had done certain work for the city, for which he had been paid on account, from time to time, as it progressed. When it was finished, he presented a statement of the whole work

done, and on which he was paid, by the officers of the city, the full contract price, they omitting, by mistake, to deduct the sums thus previously paid on account. Some months after, on discovering the mistake, they applied to McGuire to return the certificates which he had thus improperly received. He then made no claim that he was entitled to them, and promised to arrange the matter. This he neglected to do; on the contrary, he thereafter transferred to the plaintiff the balance remaining due from the sale of the certificates to the defendants.

The city of Hoboken has given actual notice to the defendants that they would not pay the certificates thus obtained, and a notice has been published in the newspapers, to the effect, that as the certificates were issued through mistake and without consideration, they would not be paid, and cautioning the public against negotiating or purchasing them. And it is alleged that the plaintiff, at the time he accepted the assignment of the claim for which this action is brought, had a full knowledge of all these facts.

Upon these circumstances, which, if proved at the trial, would seem sufficient to constitute a valid defence to this action, being shown by affidavits, I think the judge at special term erred in refusing the defendants leave to answer, thus, in effect, determining the action, and preventing a judgment from which an appeal might be taken. Code, § 349, sub. 4. This was not a case where a party was asking to have a judgment vacated, and that he be let in to defend upon the merits, the determination of which application might rest, in some degree, in the discretion of the judge, and therefore might not be reviewable upon appeal, without a certificate, under the rule of March 22, 1851; but it was the ordinary case of a party committing an irregularity in a service of a paper, and against which he was entitled to be relieved, upon such terms, however, as would be proper under the circumstances. *Quick* v. *Merrill*, 3 Caine's, 133; *Bander* v. *Covill*, 4 Cowen, 60.

It has long been the settled practice of the courts to set aside a default, on the defendant swearing to merits and paying costs;

(*Davenport* v. *Ferris*, 6 John. 131; *Tallmadge* v. *Stockton*, 14 John. 342); and in *Hanford* v. *McNair* (2 Wend. 286,) the court went so far as to hold, that, upon a motion to open a default, the ordinary affidavit of merits could not be contradicted.

Here, there is not only the usual affidavit of merits presented, but, in addition, circumstances are shown which, if uncontradicted, clearly make out a substantial defence.

DALY, First Judge.—I did not fully understand this case when the motion was made for leave to put in an answer. Upon reading the affidavit now, I find that there is sufficient in the conduct of McGuire to support the allegation that he obtained the certificates fraudulently. The great excess over the amount due him, which was $3,519, for which he received certificates for $8,909, or $5,390 more than he was entitled to; his haste to get the signature of the mayor, his subsequent recognition of the fact that he had been overpaid, and his promises to go over to Hoboken and arrange the matter, which he never kept; are circumstances from which it may be inferred that he disposed of the certificates to the defendants with a knowledge that he was not entitled to $5,390 of the amount they represented. That, in the sale of them to the defendants, he dishonestly concealed the facts which, if disclosed, would have enabled the defendants to know that what they were purchasing was improperly obtained by McGuire from the corporation of Hoboken. There may be some difficulty in the defendants' setting up a defence, unless the Hoboken corporation are made parties; but I quite agree with Judge HILTON that the defendants' rights should not be summarily disposed of upon a motion like this. That there is quite enough in the affidavit to show a dishonest attempt on the part of McGuire and his assignee, who is alleged to have knowledge of the fact, to obtain, either from the defendants or the corporation of Hoboken, a large sum of money to which they know they have no claim.

Order appealed from reversed, and defendants permitted to answer upon payment of $10 costs of the motion at special term.

EPHRAIM S. DALTON *v.* JOHN C. DANIELS.

Where a custom is shown to exist in a particular trade or business, parties engaged in the business are presumed to contract with reference to the custom, unless it is otherwise expressly agreed.

But a usage of trade cannot be shown which contravenes an established rule of law, or is in opposition to the terms of an express contract.

On a sale of liquor in barrels, a deficiency in the quantity sold was shown, according to a custom in the trade, by which one barrel in every ten is examined and measured, and an estimate made of the whole, based on a measurement thus made; *Held*, that the custom, not being contrary to law, was valid.

APPEAL from a judgment of the First District Court, in favor of the plaintiff. The action was brought to recover the value of 140 gallons of liquor, being a deficiency in quantity on a sale of liquor, in barrels, by the defendant to the plaintiff. The sale was made by the number of gallons marked on the outside of each barrel; but, after delivery, the actual quantity was ascertained, according to a usage of the trade, by which one barrel is taken from every ten, and measured, and an estimate made of the whole quantity founded on such a measurement. In this way it was found that there was a deficiency in the quantity sold of 140 gallons, for which the plaintiff brought suit, and after proving a measurement in this manner, and showing that both parties were dealers in liquors, rested his case at the trial. The defendant claimed that an actual measurement of each barrel must be shown before a recovery could be had, and that an alleged deficiency could not be established in any other way. The justice held otherwise; and having given judgment for the plaintiff, the defendant appealed.

Miller, Peet & Nichols, for the appellant.

John H. McCunn and C. Fine, for the respondent.

By the Court, BRADY, J.—This action was brought to recover

for an alleged deficiency in the quantity of a lot of liquors, sold in barrels by the defendant to the plaintiff. The deficiency was ascertained by the examination of ten barrels out of one hundred barrels and of eight barrels out of seventy-five barrels—the former being made by an inspector of liquors, and the latter by a gauger or measurer of liquors. The mode of ascertaining the deficiency was as follows: one barrel out of every ten, and ten barrels out of every hundred, taken promiscuously, were examined by sealed measure, and an estimate, based upon that measurement, was made as to the whole number. The barrels, it was also proved, did not hold out according to the original marks on them, and for the reason, it would seem, that the heads were unusually thick. Having proved the deficiency, in the manner stated, of 100 barrels, the plaintiff's counsel asked the following question: Is there any custom in the liquor trade whereby the measurement of barrels is arrived at by measuring certain numbers out of a larger lot, and determining the measurement of the whole lot by averaging those measured, and if so, what is that custom? The question was objected to because the witness was incompetent, and because the custom was not legal, and could not be sustained, if proved. The objection was overruled, and the defendant excepted. The witness answered that there was such a custom, which was to measure ten barrels out of every hundred, and in that proportion, taken promiscuously, in order to ascertain the contents or measurement of the whole lot, and the witness said, in addition, "We never measure the whole lot." The question and answer here stated are not so stated for the purpose of considering the exception taken, but to show what the custom was in fact. The exception was abandoned by the defendant's counsel subsequently admitting that the custom proved existed, and that the defendant knew of it; the defendant's counsel still insisting, however, that the custom was illegal, and could not be sustained. The question presented therefore, on this appeal, on these facts, is whether there was sufficient evidence of the deficiency claimed, or, in other words, whether it was not the duty of the plaintiff to prove by the ac-

tual measurement of each barrel, the deficiency thereof. The question is simple, and may be readily and speedily disposed of. It is a well settled principle of law, that where a custom exists in reference to a particular trade or business, and the parties engaged in that business know of the custom, it is to be presumed that their contracts are made in reference to it, unless expressly excluded by them, (*Allen* v. *Merchants' Bank N. Y.*, 22 Wend. 215; Story on Con., 3d ed., § 14, 651, and cases cited; 2 Smith's Leading Cases, 681, 682; *Hinton* v. *Locke*, 5 Hill, 437; 2 Parsons on Con., 49, and cases cited; *Bridgeport Bank* v. *Dyer*, 19 Cowen, 140), although it is said that a usage of trade cannot be set up either to contravene an established rule of law, or to vary the terms of an express contract. *Rankin* v. *Amer. Ins. Co.*, 1 Hall, 619; *Sewall* v. *Gibb*, 1 Hall, 602; *Dunham* v. *Dey*, 16 Johns. Rep. 367; *Hone* v. *Mutual Safety Ins. Co.*, 1 Sandf. 137; *Hinton* v. *Locke*, 5 Hill, 437; 2 Smith's Leading Cases, 686; *Smith* v. *Lynes*, 3 Sand. S. C. R. 203; *N. C.*, 1 Selden, 41, on appeal.

The custom proved and admitted did not contravene any established rule of law, on any given state of facts, but related simply to the mode of ascertaining a fact upon which a rule of law might be declared. The contract between the parties, enlarged or fully expressed by reference to the custom mentioned, would be, "I sell you a number of barrels of liquor, which I say contain a certain number of gallons, stated on this bill, but the exact quantity may be ascertained by measuring ten out of every hundred of the barrels, or in like proportion for any number, and making a general estimate founded upon such measurement." This mode of ascertaining the quantity is reasonable and convenient. It is equally open to both parties, and must result often in a saving of labor, time and expense. It does not contravene any policy or principle of the law, and is, in fact, an agreement that as to quantity both seller and buyer may, by a system of average, determine the number of gallons contained in a number of barrels, without gauging or measuring each one. As a commercial usage, it seems to be one of great utility, and

so far as the evidence given in this case illustrates its operation, it subserves the ends of justice, inasmuch as no testimony was offered by the defendant to controvert the result of the examination by the plaintiff's witnesses. The result must be assumed to be correct, and the plaintiff's cause fully established. The authorities to which reference has been made present not only the general rules governing these cases, but a variety of illustrations in their application. I have discovered one case, however, bearing more directly on the particular point in question than any I have been able to find. *Barton* v. *McKelway*, 2 N. Jer. 165. The action was on a contract to deliver a number of moris-multicaulus trees of "not less than *one foot high*." It was held, that it might be shown that by the universal usage and custom of dealers in that article, the length was measured to the top of the ripe wood, rejecting the green, immature top. See also conclusion of note in 2 Parsons, (*supra*), page 54.

Judgment affirmed.

CARL STRUVER AND OTHERS *v.* THE OCEAN INSURANCE CO.

An answer consisting of averments false in fact, is a sham pleading.

A pleading is irrelevant which consists of matter having no substantial relation to the subject of the controversy.

A frivolous answer is one which, assuming its contents to be true, presents no defence to the action.

Where an answer states facts which, if properly averred, might constitute a valid defence, it will not be stricken out as sham, irrelevant, or frivolous.

Defective averments in a pleading should be taken advantage of by demurrer.

APPEAL from an order made at special term striking out the defendants' answer as frivolous and irrelevant, and giving judgment for the plaintiffs, unless an amended answer was served within five days. The defendants declined to serve an amended answer, and appealed from the order.

Charles B. Cromwell, for the appellants.

Lane & Roelker, for the respondents.

By the Court, BRADY, J.—The plaintiffs have mistaken their remedy. They should have either demurred to, or moved to make the first defence set up in the answer more definite and certain. The substance of this part of the answer, if well pleaded, would be a defence to some part of the plaintiffs' claim. If the notes were given in payment of a claim arising upon a policy of insurance fraudulently procured, the plaintiffs could not succeed The question of consideration is always open between the original parties to a promissory note. The distinctions between a sham, irrelevant, and frivolous answer, are settled by many authorities which will be found collected under sections 152 and 247 of the Code. Voorhies' ed. 1857. A sham answer is one that is false in fact. A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action; and a frivolous answer is one which, assuming its contents to be true, presents no defence to the action. An answer, however, which is so framed that it does not set up a valid defence, but which states facts that may, by being properly averred, constitute a defence, will not be struck out as sham, irrelevant, or frivolous, but it may be demurred to. *Alfred* v. *Walkins*, 1 Code Rep. (N. S.) 343. The answer in this action may be stated thus: As to $2,500 of the plaintiffs' claim, the plaintiffs are not entitled to a recovery because they obtained a policy upon a vessel they knew to be unseaworthy and did not disclose the fact, and as to the balance it is for notes given in settlement of a claim arising upon a policy and for a loss represented by the plaintiffs to be a total loss which was not true, but on the contrary, the plaintiffs sold the vessel insured, and appropriated the proceeds without accounting. If these facts were well pleaded, it seems to me that they constitute a defence to the action. It is not an answer to this view that the defendants do not show an organization which gives power to insure. The plaintiffs have

described them as an insurance company and have alleged their incorporation. Nor is it an answer that the notes are a payment of the loss, for the reason that the defence, if good at all, is one of fraud on the part of the plaintiffs, and that defence is not precluded by the settlement.

DALY, First Judge.—I agree with Judge BRADY, that this answer should not have been stricken out as irrelevant and frivolous, but that the question of its insufficiency should have been raised by demurrer. I shall not, therefore, discuss the question whether there is a sufficient averment of fraud contained in the answer, to release the defendants from the effect of an adjustment and settlement of the loss by the giving of their promissory notes, or the other matters relied upon as a defence, as I have already intimated my views upon the motion below, and it would not be proper again to consider and review the matter until after the defendants have been heard upon the demurrer.

Order appealed from reversed, with costs.

JOHN SEXTON *v.* SAMUEL FLEET, AND CATHARINE FLEET HIS WIFE.

In an action brought to reach the separate estate of a married woman, the complaint alleged the making of a promissory note by the husband, the guaranty thereof by the wife, the protest of the note, and notice thereof to her. Also that, at the making of the guaranty, she possessed a separate estate; that the note was given by the husband in payment for services rendered thereto in the erection of a building, &c.; that the guaranty was accepted on the credit of such estate, and that the note thus guaranteed had been duly indorsed to the plaintiff. *Held*, bad on demurrer.

A married woman cannot contract by guaranty, and as the only cause of action alleged against her was upon such a contract, and not upon any equitable obligation or demand, the payment of which would be enforced out of her separate estate, the complaint therefore was defective.

A chose in action may be transferred by parol as well as by writing, and a blank

indorsement upon a written instrument, not a promissory note, is sufficient to pass all interest in it.

Per BRADY, J.—In an action against a married woman, her separate property may be reached by judgment and execution in the ordinary form, and in the same manner as if she were a *f me sole*.

APPEAL from a judgment in favor of the defendants upon a demurrer to the complaint.

The case at special term was heard by Judge DALY, who sustained the demurrer in the following opinion:

DALY, First Judge.—The complaint is defective. It alleges that the defendant Catharine Fleet was, and still is, possessed of certain property and real estate in her own right, and as her separate estate and property, and prays that the debt, for the recovery of which the action is brought, may be decreed and declared a charge upon her property and separate estate; that the plaintiff may be paid the amount of his debt out of the same, together with his costs, and that a receiver may be appointed for that purpose; and that her separate property may be sold under the direction of the court, and the plaintiff paid out of the proceeds of the sale.

To enable the court to give the equitable relief asked for, the complaint should set forth the property upon which the debt is to be declared a charge, and which is to be applied in payment of it. In actions of this description, the court can make no personal decree against the wife. *Rogers* v. *Ludlow*, 3 Sandf. C. R. 109; *Cobine* v. *St. John*, 12 How. P. R. 333; 2 Story's Eq. Jur. 629, §§ 1397–1400. The proceeding is *in rem*, (*Ashton* v. *Aylett*, 2 Mylne & C. 111), the object being to reach her separate estate, which she may be presumed to have charged by appointment with the payment of the debt, (*Vanderheyden* v. *Mallory*, 1 Comst. 452), or at least so much of it as will be sufficient to satisfy the plaintiff's claim. "As creditors," says Lord COTTENHAM, in *Owens* v. *Dickenson*, (1 Craig & Ph. 48), "have not the means, at law, of compelling payment of such debts, a court of equity takes upon itself to give effect to them—not as personal

liabilities, but by laying hold of the separate property—as the only means by which they can be satisfied."

The property, therefore, which the creditor proposes to reach in equity, must be stated, and the nature of the wife's interest in it, that the court may frame its decree in such a manner as to secure the equitable debt with as little injury to the separate estate as possible. Thus, if payments are coming due to the wife out of a particular fund, the court will decree that the payments be applied to the satisfaction of the debt, if they are sufficient for that purpose, without impairing the fund, as was the case in *Stuart* v. *Rockwell*, (3 Madd. 387), and *North American Coal Company* v. *Dyett*, (7 Paige, 9); or, if she have real estate, they will direct that the rents and profits be applied, as was done in *Bulpin* v. *Clark*, 17 Ves. 365.

Wherever this equitable relief has been granted to a creditor, he has set forth in his bill or complaint the particular property out of which he has asked to have the debt satisfied; (*Vanderheyden* v. *Mallory*, 3 Barb. C. R. 9; *North American Coal Company* v. *Dyett*, 20 Wend. 570; and see all the cases collected in the English and American notes to *Hulme* v. *Tenant*, 1 White's Leading Eq. Cas. (65 Law Library,) 394; see also Macqueen on Husband and Wife, 294; 1 Daniel's Ch. Pr. 205); and where bills have been filed to enforce a charge upon a wife's property, merely averring that she has a separate estate, without stating its character, nature or kind, they have been dismissed. In *Francis* v. *Wiggatt* (1 Madd. 258,) the bill was filed to compel the defendant and his wife to purchase an estate, setting forth that the wife had separate moneys and property of her own to a larger amount than the purchase money; but it was dismissed because it did not state the nature of the property, whether real or personal, or what power she had over it, or whether it could be made available to answer the plaintiff's demand; and in *Aylett* v. *Ashton*, (1 Mylne & C. 105), the bill was to compel a married woman to execute a lease, but the bill was dismissed because it did not sufficiently appear what interest she had in the premises she had agreed to lease.

The power to compel the application of the separate property to the payment of this debt being exclusively in equity, the decree must specify out of what property it is to be paid. If the defendants, therefore, should suffer this case to go by default, we could give the plaintiff no relief, as he has not pointed out in his complaint any fund, or any particular property, which the court, by its decree, could direct to be applied.

The demurrer of the defendant is well taken, as the complaint does not disclose a case entitling the plaintiff to any equitable relief, or rather upon which the court could give any equitable relief.

The plaintiff appealed. The pleadings are given substantially in the opinion of Judge HILTON.

Henry P. Townsend, for the appellant.

John Moody for the respondent.

HILTON, J.—The complaint alleges that the defendant, Samuel Fleet, made a certain promissory note for $150, payable to the order of Patrick McHill, thirty days after date. That after the note had been delivered to McHill, the defendant, Catharine Fleet, in consideration of one dollar, guaranteed its payment, and held her separate estate liable therefor. That the guaranty was written on the back of the note, and, as thus indorsed and guaranteed, the note was delivered to McHill, who indorsed and delivered it to James McMullins, and McMullins afterwards indorsed it to the plaintiff, the present holder and owner of it. That at the time of making the note and guaranty, the defendant Catharine was, and still is, possessed of property and real estate in her own right, and that the note was given by the dedefendant Samuel, in payment for services rendered in the erection of buildings on premises owned by Catharine as her separate property, and the guaranty was accepted on the credit of her separate estate, and "the further consideration therefor was for services performed upon her said property."

The separate property is not stated. The plaintiff asks that the amount of the note and costs of protest may be declared a charge upon the separate estate of Catharine, and that such estate may be sold and the plaintiff paid out of it.

The defendants demur upon two grounds: 1st. That the defendant Catharine is improperly joined as a party defendant. 2d. That the complaint does not state facts sufficient to constitute a cause of action against her separate property.

The complaint shows a cause of action against the defendant Samuel, as maker of the note, and does not *allege* any valid cause of action against the defendant Catharine. Yet a judgment is only demanded against her separate estate. If the defendants had answered, instead of interposing a demurrer, there cannot be much doubt that the court could give judgment against Samuel, as maker of the note, notwithstanding the absence of any demand for relief against him. Code, § 275. And if, as the plaintiff seems to suppose, the action is only to enforce the obligation of Catharine, entered into upon the credit of her separate estate, then, by the defendant's answering, the action would require different places of trial. As against Samuel, it would have to be tried by a jury, unless a jury trial should be waived. Code, § 253. And against Catharine, it would be tried by the court. § 254. Although a party may unite in his complaint several causes of action, of a character both legal and equitable, yet they must affect all the parties to the action, and not require different places of trial. Code, § 167.

As the defendant Catharine is not a necessary or proper party to an action against her husband upon his promissory note, nor does such a cause of action affect her, it is quite clear that the first ground of demurrer is well founded.

And it seems to me that the second ground must also be sustained.

It is not alleged that McHill performed services at the request of Catharine, for the benefit of her separate estate, and that the claim therefor has been assigned to and vested in the plaintiff as the real party in interest, (Code, § 111); but the cause of ac-

tion stated against her is, that she made a certain guaranty for a certain consideration, and which guaranty was accepted on the credit of her separate property. That this guaranty has been indorsed to the plaintiff, and he asks to have it declared a charge upon and paid out of her property.

The answer to all this is, that a married woman cannot make such a contract, (Reeves' Dom. Rel. 98), so as to bind herself; and although the plaintiff may be entitled to be considered in equity as the assignee of an obligation, or demand for services rendered, the payment of which will be enforced out of the separate estate of the defendant Catharine, (*Heath* v. *Hall*, 4 Taunton, 326; Willard's Eq. Juris. 462), yet he has not alleged, in his complaint, the facts which really constitute his cause of action against her, as a substantive ground for the relief he demands.

Without expressing any opinion upon the other points discussed in the opinions of my brethren, I agree in their conclusion that the judgment appealed from should be affirmed.

BRADY, J.—On precedent and authority the judgment given by Judge DALY in this action cannot be assailed; but whether the separate estate of a married woman—under the Code, and since the statutes of 1848 and 1849 in relation to married woman—can be sold without resorting to the mode of proceeding against *feme coverts*, which prevailed in the late Court of Chancery, is a question which has not yet been decided in the court of last resort. I have already expressed an opinion on the subject, (*Walker* v. *Swayzee*, 3 Abb. Pr. Rep. 136), and have not changed the views then entertained. In this case it appears that the note guaranteed by the defendant Catharine, was drawn by Samuel, her husband, in payment for services performed towards the erection of certain buildings upon premises owned by her in her own right, and that the guaranty was also accepted on the credit of such separate estate. It also appears that she is still possessed of certain property in her own right, although the property is not described or particularly designated. If these allegations be true,

and such must be the presumption, the defendant Catharine has property which can be reached by execution, and there does not seem to be any well founded reason why any extraordinary measures should be resorted to, to secure the appropriation of that estate. The wife holds her separate property as if she were a *feme sole*, and the property of a *feme sole* is not exempt by law from the ordinary forms of procedure in courts of justice. When it appears that she has contracted a debt that can be enforced against her, enough is shown to demand the power of the courts, and considering her independent position in reference to her property, it is sufficient for the courts to protect her from obligations which do not affect or relate to her separate estate. There is, however, an insuperable objection to the plaintiff's recovery, and that is that the guaranty is void. *Van Steenburgh* v. *Hoffman*, 15 Barb. S. C. R. 28. A married woman has no power to bind herself by contract, and the transfer of the guaranty to the plaintiff carried with it no cause of action. If the debt or claim had been transferred to the plaintiff, there is no doubt that in a proper mode of proceeding he could enforce it; but the debt or claim was not transferred, and the plaintiff has no cause of action in his favor against the defendant Catharine.

DALY, First Judge.—The complaint avers that the note was made and given by the husband, in payment for services rendered by the payee, in the erection of buildings upon premises owned by the wife in her own right, as her separate estate and property, and that the wife, in consideration of one dollar, by an indorsement on the back of the note, guaranteed the payment of the note, and held her separate estate liable for the payment of the same. A *feme covert* may, by appointment, charge her separate estate with the payment of a debt. It is not even necessary that she should enter into a positive agreement, expressing her intention so to do; but the intention may be inferred from the kind of obligation she entered into, and the fact that she had a separate estate. 2 Story's Eq. Jur. 1398 to 1402. Thus, it may be inferred simply from her signing a bond, (*Hulme* v. *Tenant*,

1 Brown's Ch. R. 16; *Heatly* v. *Thomas*, 15 Ves. 596), or from her accepting a bill of exchange, (*Stewart* v. *Kirkwall*, 3 Mod. 387), or making a promissory note, (*Bulpin* v. *Clark*, 17 Ves. 365), for though such instruments, made by a married woman, are void at law, they are good contracts in equity, where she has a separate estate, and, *prima facie*, will be presumed to have been made with an intention to bind it. 2 Roper on Husband and Wife, 241, and note *a*; 2 Story's Eq. Jur. § 1400. Here it is averred, not only that the wife had a separate estate, that the note was for a debt arising from services beneficial to that estate, but that there was an express agreement, in writing, indorsed by her upon the note, charging her separate estate with the payment of the debt. There was, then,—even more than a court of equity requires,—an appointment by writing, charging her separate estate; and the delivery of this note by the husband and wife, with this appointment in writing by the wife indorsed upon it, to the payee, vested in him every right of action for the payment of the debt which a court of equity would enforce against the separate estate of the wife.

This written appointment indorsed upon the note was in the nature of a chose in action, which could be enforced against the separate estate of the wife, and the indorsement and delivery of the note which transferred to the indorsee a right of action at law against the husband as maker, carried with it and transferred also the appointment and charge upon her separate estate, written by the wife upon the back of it. *Accessorium non ducit sed sequitur suum principale.* "When a subject," says Lord KAMES, "is conveyed, every one of its accessories are understood to be conveyed with it, unless the contrary be expressed." 1 Kames' Principles of Equity, 240. When this note, therefore, was delivered, as it is averred to have been, by Mr. Hill, the payee, to Mullins, with the wife's engagement indorsed upon it, that delivery transferred to Mullins, and vested in him, every right, legal or equitable, which Mr. Hill had before such act of delivery against the defendant and his wife, growing out of their respective written engagements. The note could not pass by indorse-

ment and a delivery, without a delivery also of the wife's written appointment indorsed upon the back of it. The act that transferred the one, necessarily operated as a transfer and delivery of the other. It is averred that Mullins duly indorsed and delivered the same to the plaintiff, and that the plaintiff is now the lawful owner and holder.

This was a sufficient transfer. A debt or claim may pass by parol as well as by writing, and where it is founded upon any written obligation or instrument, anything between the contracting parties which indicates their intention to pass the beneficial interest in the instrument from one to the other, is sufficient. 2 Story's Eq. Jur. § 1047; Willard's Eq. Jur. 462; *Slaughter* v. *Faust*, 4 Blackf. 380; *Montgomery* v. *Dillingham*, 3 Smee. & M. 647. "If two men agree for the sale of a debt," says Sir JAMES MANSFIELD, in *Heath* v. *Hall*, (4 Taun. 327), "and one of them gives the other credit in his books for the price, it is a good assignment in equity, though a deed would not assign it at law." In *Hastings* v. *McKinley* (1 E. D. Smith, 273,) we held that an indorsement in blank upon an instrument not a promissory note was sufficient to pass the interest in it. The rule, as understood by us, was laid down by Judge WOODRUFF, that "there is no necessity of a written assignment where there is an actual transfer and delivery of the thing in action, with the intent to vest the interest in the transferee, so that the court can see that the whole equitable interest and property in the money agreed to be paid, is in the plaintiff;" and in *Clark* v. *Downing* (1 E. D. Smith, 406,) we held that the assignee of a debt might acquire the sole interest and right of action upon it by a mere gift, without any consideration whatever. The only restriction in a court of equity, upon such equitable assignments, was in refusing to interfere in the case of a mere nominal assignee. It was necessary that he should be the real party in interest; that the Code now requires in all actions arising out of contract, and the plaintiff has here averred that he is the real party in interest.

This is not an action upon the note against the husband. It is an equitable action brought to have the amount named in the

guaranty declared a charge upon the separate estate of the wife. The husband was a necessary party. He had to be joined in the action against the wife. The Code provides that, when the action concerns her separate property, she may sue alone, but does not declare that in an action concerning her separate property, she may be sued alone; on the contrary it provides that, where a married woman is a party, her husband must be joined with her except in two cases—where the action is between herself and her husband, and where she brings an action concerning her separate property. It was necessary in the complaint to aver the making of the note, to show the nature of the equitable charge that the wife had created upon her separate estate; and the fact that the making of the note is stated in the complaint, does not make it an action upon the note against the husband so as to require separate places of trial. No judgment for the amount of the note is asked against the husband, and where the plaintiff merely claims to have the amount declared a charge upon the separate estate of the wife, it is not for us to say that it is an action against the husband for the recovery of the amount of the note. The averment in the complaint is, that the note was given for services performed towards the erection of buildings upon premises owned by the wife; that she guaranteed the payment of it, and held her separate estate liable for the payment of the same. This is not the averment of any contract by the wife, but of facts which show that she has equitably charged her estate with the payment of a sum of money, the value of which has gone into her estate, and the benefit of which she enjoys. That she can so charge her separate estate, and that the court can enforce the payment of the charge out of her estate, has been abundantly shown by the authorities quoted above, and those cited in the opinion delivered upon the motion below.

Judgment affirmed.

ANDREW OAKLEY *v.* THE WORKING MEN'S UNION BENEVOLENT SOCIETY.

On the return of a summons in a district court, in an action against an incorporated society, the president appeared and put in an answer, alleging payment of the amount claimed; at a subsequent day, to which the trial was adjourned, the defendant failed to appear, and the plaintiff had judgment upon the pleadings. *Held*, upon appeal, that the judgment was regular.

In the absence of any proof to the contrary, this court will, upon an appeal, assume that a person appearing for a defendant in a district court, was authorized so to do, as his attorney or agent.

APPEAL by the defendants from a judgment entered against them in the Sixth District Court. The action was to recover for moneys which accrued to the plaintiff, as a member of the defendants, for monthly benefits. On the return of the summons, the president of the society appeared, admitted that it was an incorporated body, and that the money claimed had accrued to the plaintiff, but alleged that he had been paid. An answer of payment having been put in, the trial was adjourned. At the adjourned day, no one appearing on behalf of the defendants, the plaintiff had judgment on the pleadings, and without making any proof of his claim. The defendants appealed.

McCunn & Moncrief, for the appellants.

William A. Coursen, for the respondent.

By the Court, DALY, First Judge.—We have nothing before us in this case but the justice's return. If the admission, made by the president of the society, was the result of collusion between him and the plaintiff, that fact should have been shown by affidavit. From the return, there was no error in the proceedings or in the giving of judgment. On the return day of the summons the president of the society appeared for the defendants, and admitted that they were an incorporated body.

He also admitted that thirty-six dollars had accrued to the plaintiff as a member of the society, being his monthly benefits; but, as an answer to the action, pleaded that the thirty-six dollars had been paid to the plaintiff. Issue being thus joined upon the plea of payment, the cause was adjourned, by consent, to another day for trial. On that day no one appeared for the defendants, and the plaintiff had judgment for the thirty-six dollars. This was entirely regular. The plaintiff was not required to prove what was admitted by the pleadings upon the joining of issue. The only point at issue was, whether the defendants had paid the thirty-six dollars; and that was for them to prove. They neglected to appear, and the plaintiff was entitled to judgment. The president must be regarded as appearing for the corporation, as their attorney in fact; for, in defending a civil action, a corporation aggregate can appear only by attorney, (Coke Litt. 66, b. 10 Rep. 32), and the court will assume that he who appears for them, as their attorney, was authorized to do so under their common seal. *Thames Railway Co.* v. *Hall*, 5 M. & Gra. 287. If the fact was otherwise in this case, the appellants should, upon the hearing of the appeal, have read an affidavit to that effect, assigning it as error in fact.

In the district courts parties may appear and defend in person, or by an attorney of the Supreme Court of this state, or by an agent. District Court Act, 1857, p. 80, § 9, sub. 1. The president, in this case, appeared as the defendants' agent or attorney in fact, and it will be assumed that he had authority to do so until the contrary is shown. Appearing and pleading in the suit as their agent, his admission upon the joining of issue was binding upon them.

Judgment affirmed.

THOMAS SCANLAN *v.* RICHARD B. COWLEY.

In an action for malicious prosecution, the question of probable cause does not depend upon an offence having been committed, nor upon the guilt or innocence of the party accused.

It is enough, if the circumstances shown were sufficiently strong to justify a cautious man in the belief that the accused was guilty of the charge made, and that the prosecutor, at the time, honestly entertained such a belief.

APPEAL from a judgment, entered at special term in favor of the plaintiff, upon a trial, by consent of parties, before a judge without a jury. The defendant appealed. The facts appearing in the case are stated in the opinion of Judge HILTON.

William R. Stafford, for the appellant.

I. There was no proof whatever to sustain the allegation of the complaint, that the plaintiff was tried before the recorder on the charge of embezzlement. The complaint was for "embezzling fifteen dollars." The charge tried was petit larceny in stealing ten dollars.

II. Nor was there any proof to show that the defendant caused or procured the arrest for the charge upon which the plaintiff was tried.

III. The plaintiff, in order to sustain his action, was bound affirmatively to show not only express malice, but an entire want of probable cause. In this he wholly failed. His own testimony affords "a reasonable suspicion, founded on circumstances warranting a belief that he was guilty of the offence charged." *Burlingame* v. *Burlingame*, 8 Cowen, 144; *The People* v. *Hennesy*, 15 Wend. 147; Warton's Treat. on Crim. Law, §§ 1936, 1942; 10 Wend. 296; 5 Den. 76.

IV. The truth of the *facts* stated in defendant's affidavit was clearly proven, and those facts, even if insufficient to convict the plaintiff criminally of the offence charged, fully exonerate the defendant from liability in this action. *Bulkley* v. *Keteltas*, 2 Sel-

den, 384; *Foshay* v. *Ferguson*, 2 Denio, 617; 2 Wendell, 426; 7 Cowen, 281; 1 Wendell, 140; 4 E. D. Smith R. 9–12.

V. The verdict should be set aside as opposed to the weight of evidence. The plaintiff's own statement is improbable on its face, and is supported by no other testimony.

VI. The damages awarded were, under the circumstances, excessive. At most the plaintiff was entitled to nominal damages. His conduct cannot commend itself to the sympathy of the court.

James M. Sheehan, for the respondent.

I. The proof is sufficient to sustain the allegations in the complaint. Want of probable cause is shown when the complainant knew the other party claimed a right to property. 14 Wend. 192; 7 Cowen, 281.

II. Action lies for causing another to be brought before a justice and discharged. In a legal sense, any act done purposely to the injury of a person, is malicious. 2 Johns. 203; *Commonwealth* v. *Snelling*, 15 Pick. 321, 350.

III. Affidavit of complaint is admissible against defendant. Proof of arrest also admissible. 1 Phil. on Ev. (1st edition,) pp. 259, 380.

IV. Prosecution and acquittal of plaintiff evidence of malice. Record conclusive evidence of acquittal. Phil. on Ev., C. & H, part II, pp. 42, 10, 43 and 47; Willes, 520; 4 Hawks, 83; 1 T. R. 247.

V. In an action for malicious prosecution, what facts and circumstances amount to probable cause, is a question of law; whether they exist in the particular case is a question of fact. *Stone* v. *Croker*, 24 Pick. 81.

HILTON, J.—The defendant is a manufacturing jeweller, and in the fore part of August, 1855, employed the plaintiff, as journeyman, to work for him, at the wages of $5 per week. While thus employed the plaintiff offered to procure for the defendant the jobbing work of a Mr. James Turner, who did business in Eighth avenue, in this city, and the defendant agreed that if this

work was procured, he would give the plaintiff $6 per week wages. This arrangement was consummated, and the plaintiff was in the habit of calling at Turner's shop, on his way down to the defendant's place of business, getting the work to be repaired, and leaving it again, when repaired, on returning home in the evening. At this time the defendant had several workmen employed, and the repairing for Turner was done by all in the shop, and not by the plaintiff exclusively. The plaintiff subsequently moved his residence, and thereafter the defendant was in the habit of sending his other workmen for Turner's jobbing. It seems that the plaintiff was employed in the shop of the defendant like the others there, and that his wages were paid weekly, by the defendant allowing him to collect the amount which, on each Saturday night, might be owing to the defendant for the jobbing thus done for Turner, or from one Baker, for jobbing done in a similar manner. If the amount thus owing amounted to more than the plaintiff's wages, the balance was carried to Turner's or Baker's account, as the case might be, for the following week. If the amount was less than the plaintiff's wages, then the plaintiff collected and retained the whole that was due, and received from the defendant the difference between that and $6; or if the plaintiff did any overwork during the week, he was allowed to collect it also, or the difference was made up to him in the same way. In a similar manner the other workmen were paid their wages, by collecting the amounts due from the defendant's customers, and this course seems to have been adopted by the defendant as a matter of convenience. The defendant's shop expense book, and also his pass book with Turner were put in evidence, from which it appeared that the plaintiff was paid his wages, or was permitted to collect them in the manner above stated, and in no case does it appear that he ever collected and retained to his own use, from Turner, more than was due to him at the time from the defendant, for his past week's wages, as, in several instances, when Turner owed for jobbing more than this, the balance was charged in the pass book with the work which was done for Turner by the de-

fendant in the week succeeding. On August 12, 1856, the defendant discharged the plaintiff from his employment, paid him in full, and he then left. On the 23d the jobbing bills of Turner and Baker amounted to $23.27, and, on going to collect them, he found that the plaintiff had been to Baker on the 15th, and collected what was then due, and on the 16th had collected of Turner $10 in cash, and taken a gold locket, worth $5, on the defendant's account. This collection, it is alleged by the defendant, was entirely unauthorized, and, on September 17 he made a complaint before Police Justice OSBORNE, against the plaintiff, for embezzlement in thus collecting from Turner; and at the time of the complaint Turner made an affidavit of the fact that he so paid the money to the plaintiff. On this complaint the plaintiff was subsequently arrested, tried and acquitted; and this action was then brought by him against the defendant to recover damages for such prosecution, upon the ground that it was malicious and without probable cause.

Other grounds of action were also stated in the complaint, but seem to have been abandoned at the trial; and on the appeal it was not claimed by the respondent that he was entitled to recover for any other cause than the malicious prosecution alleged.

In thus stating the facts of the case, I have given what I consider to be the fair import and substance of the evidence produced at the trial, but it is proper I should add that the testimony on the part of the plaintiff, and which consisted of the evidence of himself, and of Sheehan and Baker, as witnesses, went to show that the agreement made by the plaintiff with the defendant was to the effect that this jobbing work of Turner and Baker was to be charged to the plaintiff, and done for him in such a manner as to enable him to receive a profit upon it. But a careful examination of the plaintiff's testimony shows that although this was the view he desired to impress upon the court at the trial, yet he did not actually understand the arrangement to be other than I have stated. He says, "The agreement was, he (defendant) was to do the work I was doing, (*i. e.*, the work

of Turner and Baker which the plaintiff had been doing previous to going into the defendant's employ), for me; *Cowley was to do it for me;* Cowley's boy went for the work, and took it home when it was done; I always received the money for it; Cowley kept a separate book, with the jobs all combined, and if it amounted to more than $6 per week, *he would let me collect* $6 *of it*, and put the balance over on my next week's account; I always received the money from Turner and Baker and used it as my own; when I made this arrangement *I turned them* (Baker and Turner) *over to Cowley, and he did the work* and made the charges for *it against me.* I don't know if he made any bargain with Turner or Baker as to the prices; it was this money I collected from Turner and Baker, after I left Cowley, that I was arrested for, charged with embezzling; Cowley did not discharge me; the moneys collected were $23; *they were due to Cowley for the work;* it was due by me to him; when Turner and Baker's bills were less than $6 per week, Cowley paid me the balance to make it $6; *if their bills were* $10 *per week, I was entitled to the whole of it; I never collected over* $6 *per week of them;* when their bills amounted to $6, Cowley paid me nothing; I don't know if Cowley ever collected any from them himself; he continued to do Turner's work after I left."

Upon his own statement, it thus appears that he turned over his customers, Turner and Baker, to the defendant, who did their work, and when their bills amounted to more than his weekly wages he was *allowed* by the defendant to collect that amount, and the balance was carried over to his next week's account. The pass book with Turner shows that this was not so—the balance was charged, as I have stated, to *Turner's* account for the week following. The plaintiff also says, that if their bills amounted to $10 per week, he was entitled to the whole of it, and in the next breath he adds: "I never collected over $6 per week of them." He also admits that the $23 he collected after he left defendant's employ "was due to Cowley for the work;" and then he adds: "It was due by me to him."

All this, to my mind, shows that the defendant's version of the

arrangement is the true one; at least, whether it is so or not, it cannot be denied that the clear weight of the evidence is against the version of it given by the plaintiff, and I think the judge, before whom this action was tried, by consent, without a jury, erred in finding that the plaintiff was maliciously and without probable cause arrested by the defendant on a charge of embezzlement. The circumstances in themselves were sufficiently strong to justify a cautious man in the belief that the plaintiff was guilty of the offence charged, (*Munns* v. *Nemours*, 3 Wash. C. C. 37; *Foksay* v. *Ferguson*, 2 Denio, 617), and, as was said by this court in *Gordon* v. *Upham*, (4 E. D. Smith, 9), this amounts to probable cause; and although the plaintiff may have been entirely innocent of the charge, yet it is a sufficient answer to an action of this nature, for the defendant to show that he believed the plaintiff guilty at the time the charge was made, (*Foshay* v. *Ferguson*, *supra*), and that he had a well grounded suspicion of his guilt. *Baldwin* v. *Weed*, 17 Wend. 224.

It is quite immaterial whether this question of probable cause is regarded as one of fact, depending upon conflicting evidence, or as one of law arising upon the clear weight of evidence, in favor of the view I have taken, of the testimony at the trial. The result is the same in either case, as the defendant has excepted to and appealed from the finding of the judge in this respect, (*Bulkley* v. *Keteltas*, 2 Seld. 384), and in either aspect the judgment, in my opinion, is erroneous.

DALY, First Judge.—I do not understand that it is essential to the existence of probable cause, that an offence should have been committed. In *Swain* v. *Stafford*, (3 Iredell, 289; 4 id. 392), no offence had been committed. The property supposed to have been stolen had not been taken by any one, and in fact had never been out of the defendant's possession; yet, the defendant having received such information as induced a belief of the plaintiff's guilt, it was held that there was probable cause, and that an action for malicious prosecution could not be supported. The question of probable cause does not depend upon whether

an offence has been committed, nor upon the guilt or innocence of the accused, but upon the prosecutor's belief of the truth of the charge made by him. *Siebert* v. *Price*, 5 Watts & Serg. 438. If circumstances are shown sufficient to warrant a cautious man in the belief of the truth of the charge he makes, it is enough. *Munns* v. *Nemours*, 5 Wash. C. C. 37. In this case I think that the plaintiff failed to make out a want of probable cause, and I agree that the judgment should be reversed.

BRADY, J., (dissenting).—I do not concur in the conclusion that the judgment should be reversed. Assuming the facts to be as stated by Judge HILTON, the plaintiff was not guilty of any offence, and no offence had in fact been committed. The plaintiff had, on the assumption that the facts stated by Judge HILTON are proved, been guilty of a fraud only in collecting money, without authority, which was due to another. He had been discharged by the defendant, and, at the time the collection was made, was neither the servant nor the clerk of the defendant. Where an offence has in fact been committed, probable cause would be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged; but this rule does not apply where no offence has in fact been committed. When a man seeks to secure the arrest of another, he must first satisfy himself that an offence has been commited. His ignorance of the law will not excuse him if he make a mistake. The defendant knew that the plaintiff was not his servant when the money was collected. His affidavit did not disclose that fact, however, but from its peculiar phraseology left it to be inferred that the plaintiff was in his employment when the collection was made. The fact that he was discharged by the defendant is suppressed, and I think it was designedly suppressed in drawing the affidavit on which a warrant was issued. There can be no probable cause which will justify the arrest of a man until an offence has been committed. If a man arrest another on suspicion that he has committed a

felony, and none in fact has been committed, he must respond in damages for the illegal arrest; (*Holley* v. *Mix*, 3 Wend. 350); but if an offence has been committed, the question of probable cause is then the controlling element in the case.

Judgment reversed and new trial ordered—costs to abide event.

PHILIP DUFFY *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY.

The General Railroad Law (Laws 1850, p. 233, § 44,) imposes on all railroad companies the duty of erecting and maintaining fences on the sides of their road, and until this duty is complied with they are liable for all damages done thereon to cattle and other animals.

In an action to recover for injuries done by them to cattle on their track, if it appears that such fences have not been erected and maintained, it is immaterial whether the cattle entered lawfully or unlawfully upon the premises adjoining the road, and strayed from thence upon the track, or whether they thus strayed through the mere neglect of their owner.

Until the fences have been erected, the statute excludes any defence of negligence in an action by an owner for cattle injured upon the track; but, *it seems*, after the fences have been put up, there can be no recovery in such cases, where it appears that the negligence of the owner contributed to the injury.

Covenants that run with the land, bind or affect all persons claiming or occupying under the party making the covenant.

A mere occupation of the land for a special purpose is in subordination to, and is affected by, such a covenant; and though the occupant may not be bound to perform it, yet it will operate as an estoppel against him in the cases where the landlord would be estopped by reason of it.

It seems that those covenants run with the land which are made touching or concerning it and affect its value, and are not confined to those which relate to some physical act or omission upon it.

D. hired pasture for his horse on a lot owned by B., adjoining the defendants' railtrack. The horse strayed upon the track, the fence being defective, and was killed by a passing train of cars. It appeared that the strip of land on which the track was laid had been purchased of B., and in the conveyance thereof to the the defendants, B. had covenanted, for himself and his heirs, to erect and maintain, on both sides of the strip, during the continuance of the defendants' charter,

good and sufficient fences. In an action by D. to recover the value of the horse, *held*—

I. That the covenant ran with the land, and every occupation was subject to it.

II. That D. acquired no greater rights, in respect to its occupation, than his landlord, B., had to confer, and was estopped by the covenant to the same extent as B.

III. That, as B. could not recover in such a case, D. could not.

APPEAL from a judgment of the Seventh District Court. The plaintiff recovered the value of a horse belonging to him, killed upon the defendants' track by a train of cars. The defendants appealed. All the facts shown by the return are given in the opinion.

Odle Close, for the appellants.

Freeborn Garretson Luckey, for the respondent.

By the Court, HILTON, J.—The plaintiff brought this action to recover the value of a horse belonging to him, and which was run over and killed by the engine or cars of the defendants on their railtrack in Fordham, Westchester county. It appeared that the plaintiff hired pasture for the horse upon a lot belonging to Mrs. Bassford, adjoining the strip of land on which the defendants' track was laid. That the horse was turned into this pasture lot on the morning of September 3d, 1857, and the partition fence between the lot and the railtrack being insufficient and defective, the horse strayed through it, and on the track of the defendants, and was thus killed. It was claimed by the defendants that it was negligent to put a horse in the lot referred to, the fences being in a defective condition, and a dismissal of the complaint was asked on that ground, but was denied by the justice. The defendants then produced, in evidence, a deed from Bassford and wife to them of the strip of land adjoining the pasture lot, dated January 20, 1841, and recorded in the clerk's office of Westchester county July 22d, 1843, containing a covenant on the part of Bassford, for himself, his heirs, executors and

administrators, to erect, upon the easterly and westerly lines of said strip, good, lawful and sufficient fences to inclose the same, and, at his and their own cost and charge, maintain and keep the same in good repair for the term of eighteen years, or until the expiration of the defendants' charter. The justice gave judgment for the plaintiff for the value of the horse, and the defendants appeal.

In *Corwin* v. *The New York and Erie RR. Co.*, (3 Kernan, 42), it was determined that the general duty of erecting and maintaining fences on the sides of railroads is now imposed, by section 44 of the General Railroad Act of 1850, (see Laws 1850, p. 233), upon all railroad corporations, and, until compliance on their part, they and their agents are liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon. That this duty was imposed, not only for the benefit and security of the public, but also for the benefit of the owners of cattle generally; and, until such fences are erected, the statute excludes any defence of negligence on the part of an owner of cattle killed upon the track, in an action brought by such owner against the corporation to recover damages for the injury resulting from such killing. And it is entirely immaterial whether such cattle enter lawfully or unlawfully upon the premises adjoining the railroad, and stray from thence upon the track, provided it appears that the corporation have not erected and maintained the fences required by the statute: although, after the fences have been erected, there can be no recovery in such a case where the negligence or misconduct of the owner of the cattle injured, contributed to the injury; or, in other words, the common law doctrine in respect to actions on the case for negligence, then prevails.

It may also be noticed, that in the case cited the plaintiff's cattle strayed upon the land of one Gregory, and from thence upon the track of the defendants, and, as it appeared that Gregory, like Bassford in the present case, had conveyed the strip of land for the railroad track, and in the conveyance had covenanted to erect and maintain forever all necessary fences on

each side of the railway, it was insisted that the plaintiff was bound by the covenant. But the court (MARVIN, J.) held, that as the plaintiff there was a stranger to the covenant, he could not be bound by it; adding, however, that if "Gregory's cattle had entered upon the road from his land by reason of there being no fence, and been injured, his covenant would have been a good answer to the action." Or, in other words, he would be estopped from recovering any damages resulting fron a non-performance by him of his express covenant; and although the duty had been imposed by the statute upon the corporation, yet he undertook to perform it, and as his performance of the covenant, entered into by him, would have satisfied the statute, he would not be permitted to recover for any injury resulting to himself and arising from his non-performance.

Thus, in the present case, had the horse in question belonged to Bassford, it is quite clear he would not be entitled to recover in an action like this; and the question, therefore, to be determined by us, is whether the plaintiff stands in any different position, with respect to an injury of this character, than his land lord.

It has long been settled law, that a covenant to maintain partition fences between lands granted, and other land of the grantor, runs with the land, and binds or affects all persons claiming or occupying under the party making the covenant. 2 Hilliard's Abridgement, § 48, p. 375; Platt on Covenants, (3 Law Lib.), 481; *Beddoe* v. *Wadsworth*, 21 Wend. 120; 4 Kent Com. 472, and note; *Spencer's Case*, 5 Rep. 16; *Bully* v. *Wells*, 3 Wilson, 25; *Norman* v. *Wells*, 17 Wend. 136. In the language of Ch. J. WILMOT, in *Bully* v. *Wells*, (*supra*), as reported in his opinions, (p. 341), "Covenants which run and rest with the land, lie for or against assignees at the common law, though not named. They stick so fast to the thing on which they wait, that they follow every particle of it,"—and therefore it is that, although a party may have a mere occupation of the land for a particular purpose, and which may be said to be a species of title, though of a very low order, (2 Black. Com. 195), yet it is in subordination to and

affected by the covenant of the landlord. And though he may not be bound to perform the covenant, as heir or assignee, yet it will operate as an estoppel against him in all cases in which the landlord would be estopped by reason of it.

In *Spencer's Case* (*supra*,) a distinction was taken between a covenant to *erect* a wall upon the demised premises, and in which the *assigns* of the lessee were not named, and a covenant to *maintain* a wall already erected; and it was held, that the assignee in that case (which was of the class first named), was not bound, because the thing, in respect to which the covenant was made, was not *in esse*, and had not, at the time of making the covenant, become part of the land,—it was only contemplated; although it was agreed by the judges that *because it was a thing which would directly affect the demised premises*, if the word *assigns* had been used, the covenant would have bound the assignee; but it could not be extended to him without his being named in it, as the subject matter of it did not relate to a thing in existence at the time of the demise. *Grey* v. *Cuthbertson*, 2 Chitty R. 482. But this nice distinction, originating at a time when it was necessary to use the word "heirs," or other words of inheritance, in a conveyance, in order to grant or convey an estate in fee, cannot be now said to exist, as in *Norman* v. *Wells* (*supra*, p. 148,) it was determined that those covenants run with the land, which are made touching or concerning it, and affect its value, and are not confined to those which relate to some physical act or omission upon it.

It is unnecessary, however, to pursue this subject, as it will not be pretended that the estoppel, which arises in this case, grows out of the plaintiff's liability to *perform* the covenant of Bassford. It is sufficient that his occupation was under Bassford, and in subordination to covenants contained in a deed duly recorded long previous to his entering upon the premises. He could acquire no greater rights, in respect to their occupation, than his landlord had to confer, and he is estopped, in an action of this nature, to the same extent as Bassford would have been had he been plaintiff. The covenant was one that runs with the

land, and not only affected every particle of it, but every occupation was subject to it, even though the occupant was under no obligation to perform it.

Judgment reversed.

GEORGE LAMBERT *v.* JOSEPH SNOW.

An order of arrest must relate to the whole cause of action presented by the complaint, and not to only a part of it.

Where a complaint alleges a cause of action for which an order of arrest had been previously obtained; and an ordinary demand arising on contract, for which no arrest would be granted; *Held*, that by thus uniting causes of action, to both of which the order did not extend, the right to the order of arrest was waived.

Where two demands, arising on contract, exist against a party, one of which has arisen in a fiduciary capacity, and in respect to which his arrest is desired, that would be a good reason for bringing separate actions. *Per* HILTON, J.

APPEALS from two orders made at special term, denying applications to vacate an order of arrest. The facts are fully stated in the opinion.

E. More, for the appellant, cited Code, §§ 179, 181, 200, 289, sub. 3; *D'Arrangois* v. *Republic of Mexico*, 5 Duer, 641; *Corwin* v. *Freeland*, 2 Seld. 564; *Dan* v. *Thompson*, MSS., Superior Court, General T., 1859; *Robinson* v. *Flint*, 16 How. Pr. R. 243; *Chapman* v. *Forsyth*, 2 How. Pr. R. 202; *White* v. *Platt*, 5 Denio, 269; *Stitt* v. *King*, 8 How. Pr. R. 300; *Goodrich* v. *Dunbar*, 17 Barb. 644; *Holbrook* v. *Homer*, 6 How. Pr. R. 86.

Francis Byrne, for the respondent.

By the Court, BRADY, J.—The plaintiff, on an affidavit alleging that he had consigned to the defendant a quantity of engravings, of the value of $396.47 to be sold by the latter as his

agent, and that the proceeds of such sale to said value should be returned to the plaintiff, the defendant paying the expenses in making sales; that the defendant had sold and disposed of the goods, and had refused, after demand, to pay such proceeds; obtained an order of arrest. The defendant, on affidavits prepared by him, obtained an order to show cause why the order of arrest should not be discharged. The motion to discharge was denied, and the defendant appealed to the general term. Pending that appeal a copy of the complaint was served, and the defendant, having obtained leave thereto, again moved to discharge the order of arrest on the ground that the plaintiff had united in his complaint the cause of action on which the order of arrest was obtained, and a demand arising on contract, for which the defendant could not be arrested under the provisions of section 179 of the Code. The cause of action so united is predicated of a copartnership heretofore existing between plaintiff and defendant, a dissolution thereof, and an accounting, upon which it appeared that the defendant was indebted to the plaintiff $1,050, and which he promised to pay. The second motion to discharge the arrest was denied, and the defendant appealed. Both causes of action arise upon contract, and might be united, whether they grew out of the same transaction or not. § 167, sub. 2.

The right to arrest (§ 179) is a provisional remedy, which may or may not be resorted to, and which is granted in addition to the right to recover, by judgment, the claim asserted The provisions of the Code show clearly that the order to hold to bail was intended to be independent of the pleadings, and in some cases may rest upon facts totally distinct from the cause of action; (*Corwin* v. *Freeland*, 2 Seld. 563); but I think it equally clear that, when an order of arrest is obtained, it must relate to the whole case presented, and not to a part of it. If the order is applied for in an action to recover moneys which were received in a fiduciary capacity, the plaintiff is entitled to an order of arrest on making proof of that fact; but if the action be for any other claim in addition thereto, then there is no provision

for granting an order. § 179. The order may be made where it shall appear that "the case is one of those mentioned in section 179." § 181. The defendant may give bail to the effect that he shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. § 187. These sections do not contemplate or embrace distinct causes of action, for only one of which a defendant can be arrested. The bail would assume the duty of having their principal in readiness as well for a cause of action for which he could not be arrested, as for one for which he could be and was arrested. The complaint embracing causes of the same class or character, the judgment would be single, not double. There would not be a judgment for the amount of the claim for which the arrest was ordered, and another for the claim distinctly averred as a separate cause of action. The judgment would necessarily be, if the plaintiff succeeded in establishing both claims, for the united amount of each.

Having arrived at this conclusion, there seems to be no doubt that the order of arrest should have been discharged on the second application therefor. Not upon the ground that the order was improperly held on the facts originally appearing, but upon the ground that the plaintiff, by uniting causes of action to both of which the provisional remedy did not extend, waived the order of arrest. It may be said that the better practice would be to move a discharge of the execution if issued against the person, but there does not seem to be any good reason why the responsibility of the bail should be continued beyond the time when the plaintiff has, by his own act, absolved them. I have not been successful in finding any case in which this question has been considered, and it must necessarily be decided without reference to any authority other than a construction of the provisions of the Code referred to. For the reasons assigned, I think the order at special term should be reversed, with $10 costs of the appeal.

In reference to the appeal from the order denying the first motion to discharge the order of arrest, it is only necessary to

say that, the order having been in effect discharged by the decision of the second appeal, that appeal will be dismissed without costs.

Ordered accordingly.

HILTON, J.—On reflection, I am inclined to the opinion that the order made by me at special term was erroneous, and should be reversed for the reasons assigned by Judge BRADY.

When a party has two claims against another, arising on contract, and one of which has been incurred, or has arisen in a fiduciary capacity, it would be a good reason for bringing separate actions, and in that way the difficulty which this case presents might be avoided.

HOBART ONDERDONK *v.* JAMES EMMONS AND GEORGE KUHN.

To make an appeal from a judgment of the Marine or district courts effectual under section 354 of the Code, as amended in 1858, the appellant must deposit with the clerk of this court the costs and disbursements embraced in the judgment appealed from, together with $15 to cover the costs on the appeal; or must give an undertaking to pay the costs awarded in the court below, together with all costs and damages which may be awarded against him on the appeal in this court.

But the deposit or undertaking thus required by section 354 does not operate to stay execution on the judgment appealed from.

If such a stay is desired, an undertaking must be given, as prescribed by section 356, to the effect that if the judgment be affirmed, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

Upon the first undertaking the liability of the sureties is fixed the moment the judgment is affirmed; but on the other it is essential that an execution on the judgment shall be returned unsatisfied before the sureties can be charged.

On an affirmance, a judgment to that effect is entered in the appellate court, with the costs of the appeal; and to collect such costs, an execution may be issued, or the undertaking first given under section 354 may be prosecuted. If the proceedings on the judgment appealed from have been stayed by an undertaking under section 356, the stay ceases, and an execution may be issued upon the judgment in the court below.

The appellant, on an affirmance, entered judgment in this court for the amount re-

covered in the court below, together with the costs and disbursements on appeal. After an execution thereon was returned unsatisfied, an action was brought against the sureties to an undertaking given on the appeal in the form prescribed by section 354. The justice gave judgment for the full amount of the judgment thus entered; *Held*,

I. That the judgment, having been merely an affirmance, should have been so entered, with costs of appeal.

II. That such a judgment would not authorize an execution to issue from this court to collect any sum but the costs of appeal.

III. That the defendants were only liable on their undertaking for the costs embraced in the judgment appealed from, and the costs in this court, and the judgment of the justice should be reduced to that amount.

The "damages" mentioned in section 354 applies to those cases where, on an appeal, a recovery is had by one party and costs awarded to the other, (see § 370), and a set-off is ordered and judgment given in the appellate court for the balance; such balance, if against the appellant, would be in the nature of damages against him upon appeal.

APPEAL from a judgment of the Fifth District Court. The action was upon the following undertaking, given on the appeal therein mentioned, and signed by the defendants as sureties:

DISTRICT COURT IN THE CITY OF NEW YORK FOR THE FIFTH DISTRICT.

HOBART ONDERDONK,
Respondent,
against
WILLIAM F. TRASK,
Appellant.

Whereas, on the fourth day of August, 1858, in the District Court in the city of New York, for the fifth district, the above named respondent recovered a judgment against the above named appellant for two hundred and twenty-five dollars damages, and costs, five dollars—total, two hundred and thirty dollars; and the above named appellant, feeling aggrieved thereby, intends to appeal therefrom to the Court of Common Pleas for the city

and county of New York. Now, therefore, we, William F. Trask, of No. 134 Sixth avenue, in the city of New York, and James Emmons, of No. 263 West 33d street, in the city of New York, and George Kuhn, of No. 273 Bowery, in the city of New York, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs, disbursements and extra costs awarded against him in the court below, if such judgment shall be affirmed by the appellate court on such appeal, together with all costs and damages which may be awarded against him thereon.

WM. F. TRASK,
JAMES EMMONS,
GEORGE KUHN.

Dated August 4, 1858.

The plaintiff at the trial, after producing this undertaking as the ground for his action, read in evidence a judgment record of this court upon the appeal referred to, and which, after reciting the affirmance, awarded judgment for the appellant for $245.16, being the amount of the judgment appealed from, with the costs upon the appeal added. Thereupon the justice gave judgment in favor of the plaintiff for the $245.16, with $12 costs. The defendants appealed.

Thomas W. Smith, for the appellants.

Samuel Jones, for the respondent.

By the Court, DALY, First Judge.—This judgment is erroneous. Before the amendment of 1858, no undertaking was necessary upon an appeal, unless the appellant desired a stay of execution; nor would an appeal stay execution unless an undertaking was given pursuant to § 356. *Conway* v. *Hitchens*, 9 Barb. 378. By the amendment of 1858, it was declared that an appeal should be ineffectual unless the appellant deposited with the clerk of this court the costs, disbursements and extra costs embraced in the judgment appealed from, together with $15 to meet any costs that might be awarded against him in this court upon the appeal,

or, if such deposit was not made, unless he should execute an undertaking to the effect that he would, in the event of the affirmance of the judgment by this court, pay all costs, disbursements and extra costs that had been awarded against him in the court below, together with all costs and damages that might be awarded against him upon the appeal in this court.

The object of this provision is very plain. Before its enactment the prevailing party in the court below had no security for the costs incurred by the appeal, but was left to collect them by an execution issued upon the judgment of affirmance in this court. If an undertaking was given to stay execution, that undertaking covered them, as the sureties undertook to pay any amount remaining unsatisfied upon the return of an execution issued upon a judgment rendered against the appellant; but, unless there was such an undertaking, they were not secured to the party who had recovered the judgment in the court below. He might go on and collect the judgment in the court below, and if it was afterwards reversed, the appellate court would order him to restore what he had collected, with interest from the time of payment or collection. This provision for an undertaking, or a deposit, to render the appeal in any case effectual, is a security not only for the costs upon the appeal, but also for costs and disbursements incurred in obtaining the judgment in the court below. It does not operate as a stay of execution, for the 355th and 356th sections were left unchanged when this amendment was made, and they declare that if the appellant desire a stay of execution he *shall* give the undertaking provided for in the 356th section.

It is fair to assume, that if it was the intention of the legislature that the new undertaking should be a substitute for the former one, and should operate as a stay of proceedings, that they would have repealed the two sections referred to; but as they suffered them to remain, we must take the three sections together, and, taking them together, it is observable that the two undertakings differ. In the new one the liability of the sureties is fixed for the costs, disbursements, and extra costs in the court

below, and the costs and damages are awarded against the appellant, upon the appeal, the moment the judgment is affirmed. In the other, or former undertaking, the sureties are not liable unless an execution upon a judgment rendered against the appellant is returned unsatisfied, when they are liable for the amount which may remain unsatisfied. In the one case the return of an execution is essential before they can be charged. In the other, their undertaking or promise is qualified by no such condition.

As there is this difference, then, and as section 355 is imperative that the undertaking provided for in section 356 must be given to stay execution, it seems to follow that the new undertaking provided for in the amendment of section 354 was designed to be a distinct and different undertaking, and not intended as a substitute for the other. As the new undertaking must be given to render the appeal effectual in any case, and the other if the appellant wishes to stay the execution, it is necessary to ascertain the exact extent and scope of the two instruments.

As respects the former one there is no difficulty, as it covers any amount which may remain unsatisfied after the return of an execution upon a judgment rendered against the appellant. As it stays the issuing of an execution upon the judgment below, or all further proceedings if one has been issued, thus preventing a return until the judgment of the appellate court has been given, (*Smith* v. *Allen*, 2 E. D. Smith, 259), it embraces whatever is included in the judgment below, or which may remain due after the return of the execution which has been issued upon it. The new undertaking, however, extends only to the costs, disbursements and extra costs, which form a part of the judgment of the court below, and the costs and damages awarded against the appellant upon the affirmance of the judgment by this court If the judgment is affirmed, costs are and must be awarded to the respondent, (*Logue* v. *Gilick*, 1 E. D. Smith, 398); and they are collectable by an execution issued upon the judgment of the appellate court, or may now be obtained by an action

upon the new undertaking, which the appellant is in every case required to give.

If no undertaking has been given to stay execution under sections 355 and 356, the respondent proceeds and enforces his judgment by execution in the court below; and if one has been given, the stay is at an end upon the affirmance of the judgment by this court, and he is then at liberty to proceed with his execution in the court below, and enforce that judgment. The costs awarded to him upon the appeal he obtains by an execution in this court, or by an action against the parties who have become bound for their payment. The undertaking embraces also damages which may be awarded against the appellant upon the affirmance of the judgment; and, in this case, that the judgment entered in the court below upon the affirmance of the judgment of the court below, that the respondent recovered judgment in the sum of $230 damages, and costs, and that the judgment below was duly affirmed by this court at general term—and that it is adjudged that the appellant do recover $ [redacted] unt of said judgment, together with fifteen dollars [redacted] een cents for the costs and disbursements upon the a[redacted] mounting in the whole to $245.16.

It is insisted that there is an award of $230 damages against the appellant upon the affirmance of the judgment, which is embraced in the undertaking given by the defendants under section 354. I do not so regard it. This is simply a judgment of affirmance. It appears that the general term merely affirmed the judgment of the court below, which would not authorize an execution to be issued in this court upon the judgment to enforce the payment of any sum but the $15.16 costs and disbursements upon the appeal. For all that appears in this case, the judgment below may have been paid and satisfied before it was affirmed.

But we are asked what is meant in this new undertaking by damages which may be awarded against the appellant upon the affirmance of the judgment; the answer to which is, that there may be cases in which it is necessary, and in which this court

is empowered, to render judgment against the appellant, to be enforced as a judgment of this court, for a sum beyond the cost of the appeal; as for instance, under section 370, where, if a recovery be had by one party, and costs be awarded to the other, we are required, as the appellate court, to set off the one against the other, and render judgment for the balance, which would necessarily be enforced as a judgment of this court, and if the balance was against the appellant, it would, in the language of this new undertaking, be an awarding of damages against him upon the appeal. All that the plaintiff could recover in this action was $20.16. That is, $5 for the costs, disbursements and extra costs included in the judgment below, and $15.16 costs of the appeal. For that amount the judgment should be affirmed, and reversed as to the residue.

Judgment accordingly.

CHARLES J. MACDONALD *v.* CORNELIUS K. GARRISON AND CHARLES MORGAN.

Although it is usual to allow a commission to examine foreign witnesses as a matter of course, where no stay is desired, yet, upon settling the interrogatories, it is the duty of the judge, if required, to allow only such as relate to the issues to be tried in the action.

The settlement of interrogatories is equivalent to passing upon questions propounded to a witness when called to testify at the trial.

In an action to recover for services rendered in the employment of the defendants, it was conceded that certain interrogatories proposed on their part to foreign witnesses, were for the purpose of showing that the plaintiff, many years previous to his employment, had been guilty of specific acts of bad conduct which were criminal, or morally wrong. *Held*, that the allowance of such interrogatories was properly refused by the judge.

The character or credibility of a witness cannot be impeached by showing particular acts of immorality or bad conduct.

APPEAL from an order made by a judge at chambers, and

entered, refusing to settle and allow certain interrogatories proposed to be attached by the defendants to a commission to be issued for the examination, on their behalf, of foreign witnesses. The action was brought to recover the value of certain services rendered to the defendants by the plaintiff, while in their employment at Nicaragua and elsewhere, between September, 1855, and January, 1858. The defence set up was, that the defendants had paid the plaintiff in full for the services so rendered. On the application of the defendants a commission had been allowed to issue, to examine certain witnesses in Canada; but the allowance was unaccompanied by any stay of proceedings. On the presentation for settlement, to the judge at chambers, of the interrogatories on the part of the defendants proposed to be attached to the commission, it was insisted, on behalf of the plaintiff, that the subjects inquired of in no way related to the issues to be tried in the action; and thereupon the counsel for the defendants conceded that the object of the interrogatories was to inquire respecting certain alleged acts of bad conduct of the plaintiff while in Canada, many years previous to his employment, and which were criminal, or were morally wrong. The right to put these questions was placed upon the ground that their answers would have the effect of impeaching the character or credibility of the plaintiff, in case he should offer himself as a witness at the trial in his own behalf. The allowance was refused for the following reasons:

HILTON, J.—Although it is usual to grant an order for a commission upon the application of either party, where no stay is desired, almost as a matter of course, yet, upon the settlement of the interrogatories, the judge, if required, should look into the questions propounded, to see if they relate to the matters at issue, and to be tried in the action. And it is not necessary, upon such occasions, to show with absolute certainty that the subjects inquired of will be material at the trial; it will be sufficient if a reasonable ground exists for supposing that such will be the case. 2 R. S. 394, §§ 11, 14, 15.

In the present case no difference exists in respect to the object of the inquiry, or the facts proposed to be proven by the witnesses to be examined under the interrogatories now presented to me by the defendants for settlement. The conceded object is to show that, several years prior to the commencement of this suit, the plaintiff was guilty of certain acts of bad conduct which were criminally or morally wrong; and it is supposed that the effect of such evidence will be to impeach the credibility and character of the plaintiff, should he offer himself as a witness upon the trial.

The pleadings show that this action is brought to recover the value of certain services alleged to have been performed by the plaintiff at the request of the defendants, and there seems to be no possible aspect of the case in which the testimony sought to be taken by this commission would be admissible; and as the settlement of interrogatories appears to be equivalent to passing upon questions propounded to a witness when called upon to testify at the trial, I must, for the reasons stated, decline to permit the questions to be put, and refuse to settle or allow the interrogatories presented. Buller's Nisi Prius, 296; Peake's Ev. 140; 1 Greenleaf's Ev. §§ 461, 462; 4 Phillipps' Ev. (C. & H. Notes, 364) 717; *Jackson* v. *Lewis*, 13 John. 504; *Southard* v. *Rexford*, 6 Cowen, 255; *Corning* v. *Corning*, 2 Selden, 97, 104; *Newton* v. *Harris*, id. 345; *Commonwealth* v. *Moore*, 3 Pick. 194.

The application to settle defendants' interrogatories denied.

The defendants appealed from the order.

Israel T. Williams, for the appellants.

I. The statute gives the right—the absolute right—to take the testimony of any witness in a cause pending in this court, upon its appearing by affidavit that the witness does not reside in the state, and that the party is advised by his counsel that such witness is material, and that he believes the same. See 2 R. S. (3d ed.) p. 490, § 12.

II. Section 15 provides that the interrogatories shall be settled by a judge, &c.

III. Section 16 provides that either party may be allowed to insert "any question pertinent to the cause." 1. The object of the testimony, as it is claimed by the plaintiff, is to prove the plaintiff's bad character. This is competent, and "pertinent to the cause," for the following reasons: *a.* The plaintiff may be a witness, and it is proper in this case by way of affecting his credibility, or rendering him incompetent; *b.* He claims upon a *quantum meruit* for services rendered in a fiduciary capacity, &c., in which the value of the services would depend very much upon his reliability, character, and well established integrity.

John T. Doyle, for the respondent.

I. The only conceivable ground on which the plaintiff's character could be material, would be to impeach him in case he offered himself as a witness. Now, to impeach the credit and character of a witness, witnesses can only be examined as to his general character, and not as to particular facts, or his specific acts; and the reason given is, that every man may be supposed capable of supporting his general character, but it is not likely he should be prepared to answer as to particular facts without notice, and unless his general character and behavior are in issue he has no notice. This principle, in substance, has been established by many cases of great authority, and is laid down in all the elementary books on evidence without an exception. 1 Greenleaf's Ev §§ 461, 462; 2 Phillipps' Ev. 431; Peake's Ev. 140; Buller's Nisi Prius, 296.

II. The same principle has also been held by many decisions in this state, among which are *Corning* v. *Corning*, 2 Seld. 104; *Jackson* v. *Lewis*, 13 Johnson, 504; *Southard* v. *Rexford*, 6 Cow. 255; *Newton* v. *Harris*, 2 Seld. 345.

III. If the plaintiff should be produced as a witness on his own behalf, it would be undoubtedly competent, on cross-examination, to ask him whether he did or did not do or say any particular thing, but, the matter so interrogated to being collateral, the party interrogating is bound by the answer, and cannot contradict it. "The answer of a witness as to whether he has

or has not been guilty of some particular offence, must be taken, and the party against whom he has been called will not be allowed to prove the truth of the charge." *Vide* 2 Phillipps' Ev. (Cowen & Hill's Notes, part 2, note 386) 431; *People* v. *Rector*, 19 Wend. 569.

IV. It was suggested, by defendant's counsel, that to prove the plaintiff guilty of a felony ten years ago, would impair the value of his services in a position of confidence such as he filled. It is difficult to see how. The question here, is simply whether he rendered the services, acted faithfully in his employment, and what were his services worth. An inquiry into his conduct ten years ago is no more pertinent to this, than one as to his behavior whilst a boy at school.

Per Curiam.—For the reasons assigned by Judge HILTON, the order appealed from should be affirmed, with $10 costs, to abide event.

Ordered accordingly.

JAMES NEARY *v.* HOMER BOSTWICK.

The damages recoverable in an action for a breach of covenant, must not only be averred in the complaint, but must be shown with reasonable certainty at the trial, and not left to speculation and conjecture.

N. claimed damages of B., and threatened a suit for an alleged breach of covenant. The claim being disputed in good faith by B., they met, and after considering the subject, B. paid $20, which N. accepted, saying that all his claim was settled, and he would not sue: *Held*, a binding accord and satisfaction.

APPEAL from a judgment of the Second District Court in favor of the plaintiff. The facts are very fully stated in the opinion.

John B. Scoles, for the appellant.

John B. Holmes, for the respondent.

By the Court, HILTON, J.—The plaintiff complained before the justice for a breach, by the defendant, of a covenant contained in his lease to the plaintiff of the upper part of the building and premises No. 502 Broadway. In the language of the complaint, the breach consisted in "not studding and boarding up the premises; also in bad studding and improperly encroaching upon the plaintiff's premises in its putting up, and in not taking it away at the proper time." The answer was general denial, and accord and satisfaction. The justice gave judgment for the plaintiff for $150 damages, and the defendant appeals; the principal grounds relied on being, that no cause of action was shown, and also that it was proven, that before the action was brought the plaintiff received of the defendant $20, in full satisfaction of his present demands.

It appeared that the defendant leased to the plaintiff for one year, from May 1st, 1858, the upper part of house No. 502 Broadway, with the kitchen and a privilege in the yard. In the written agreement, it was recited that the defendant intended to take down the south wall of the house, for the purpose of erecting a party wall, and the plaintiff agreed to give free access, at all times, to the persons engaged in such work, and to permit them to do everything necessary and proper for its execution and completion. Also, that he would not make any claim for any loss, injury or damage sustained by him in consequence of such work or the manner in which it might be conducted; and the plaintiff was not to do any repairs, of any kind, in or upon the premises, either before or after the completion of the work. After this lease and agreement was prepared and ready for execution, as it would seem from an inspection of it, there was added to it a fire clause, and also an agreement, by the plaintiff, to put up studding and boarding to inclose the premises, and to take the same away after the completion of the wall; and for a breach of this covenant the present action was brought. The evidence on the part of the plaintiff, at the trial, tended to show that the studding and boarding up unnecessarily encroached upon his stairway, by which access to the second story was had from the street

door. That it did not extend to or include the whole of the kitchen, or to any part of an addition, one story in heighth, which existed at the end of the first story hall, and was formed by inclosing the back stoop, through which access was generally had to the yard, although it could be and was likewise reached by a stairway from the roof of this addition. One of the witnesses testified that the stairway was, by the encroachment, made so narrow, that three or four times he heard both ladies and gentlemen refuse to go up; the difficulty being, in the language of the witness, that in going up "a lady would have to raise her dress and squeeze." On his cross-examination, however, it appeared that although he worked for the plaintiff, he knew of no customers thus refusing; that he could not name the parties he saw refuse, nor did he know their business.

It was also shown, that the plaintiff put up a stairway two or three days after the studding was up, and thereafter there was free ingress. The cost of this stairway was $30, or thereabouts. The addition or extension on the first floor was proven by the plaintiff as being worth, to rent, from $175 to $200 per annum, until after the wall was taken down, and by reason of which it was rendered valueless. The business carried on by the plaintiff on the premises was the manufacture of potichomanie, diaphané, and Jouven's glove cleaner. Its extent, or in what manner it was affected, if at all, by the injuries complained of, was not made to appear; nor was it shown in what degree, or to what extent, if any, the premises were rendered less valuable or useful to the plaintiff by reason of the alleged breach of the agreement by the defendant, in respect to the studding and boarding. During the progress of the work, access could at all times be had to the yard, although it was considered dangerous and unpleasant on account of the caving in of the earth, yet no accident ever happened, nor was any special injury shown to have resulted from this inconvenience or fear of danger.

When the troubles and injuries complained of by the plaintiff would seem to have reached their highest point, and in the month of July, the defendant called on him, and he demanded

damages for his injuries at that time, stating what they were, and in what they consisted. He then agreed to take $20 for his demands, and the defendant paid it, the plaintiff saying that he took it to save trouble. Upon this point the plaintiff further testified, that he accepted this $20 as a compromise only, for his loss of rent of the addition up to that time; but the subsequent testimony on the part of the defendant, and which the plaintiff did not deny, was that the defendant declined to pay anything whatever, claiming that the agreement permitted what was done, and that the plaintiff had no right under it to the addition or extension. The plaintiff threatened a lawsuit, and was told to sue away; and the defendant arose to go. The plaintiff then said he would take $20 and settle it, and the defendant paid it to prevent a lawsuit. The plaintiff had previously stated all he complained of, and which was of the hole in the cellar, the timbers under the building, and the addition. On receiving the $20 he pledged his honor that all his claim was settled, and he would not sue.

The outline of the case here given is from the plaintiff's evidence, except as to the defence of accord and satisfaction; and that is taken from the whole case. Upon such testimony, I am at a loss to discover upon what ground the justice arrived at his conclusion that the plaintiff was entitled to the damages he awarded. The action was upon an alleged breach of covenant, and in such cases it is well established that the damages to be recovered must not only be averred, but must be shown with reasonable certainty, and not left to speculation and conjecture. 1 Chit. Pleadings, 386; *Squier* v. *Gould*, 14 Wend. 159, and cases cited; *Bogart* v. *Buckhalter*, 2 Barb. S. C. R. 525; *Fox* v. *Decker*, 3 E. D. Smith, 154; *Giles* v. *O'Toole*, 4 Barb. S. C. R. 264; *Vanderslice* v. *Newton*, 4 Comst. 132; *Griffin* v. *Colver*, 16 N. Y. Rep. 489; Sedgwick on Damages, 575, 576.

Here the omission of the averment of any damage whatever in the complaint cannot be now considered, as the defendant waived all objection to such omission by answering and going to trial upon it. But this waiver was not an admission that the

is empowered, to render judgment against the appellant, to be enforced as a judgment of this court, for a sum beyond the cost of the appeal; as for instance, under section 370, where, if a recovery be had by one party, and costs be awarded to the other, we are required, as the appellate court, to set off the one against the other, and render judgment for the balance, which would necessarily be enforced as a judgment of this court, and if the balance was against the appellant, it would, in the language of this new undertaking, be an awarding of damages against him upon the appeal. All that the plaintiff could recover in this action was $20.16. That is, $5 for the costs, disbursements and extra costs included in the judgment below, and $15.16 costs of the appeal. For that amount the judgment should be affirmed, and reversed as to the residue.

Judgment accordingly.

CHARLES J. MACDONALD *v.* CORNELIUS K. GARRISON AND CHARLES MORGAN.

Although it is usual to allow a commission to examine foreign witnesses as a matter of course, where no stay is desired, yet, upon settling the interrogatories, it is the duty of the judge, if required, to allow only such as relate to the issues to be tried in the action.

The settlement of interrogatories is equivalent to passing upon questions propounded to a witness when called to testify at the trial.

In an action to recover for services rendered in the employment of the defendants, it was conceded that certain interrogatories proposed on their part to foreign witnesses, were for the purpose of showing that the plaintiff, many years previous to his employment, had been guilty of specific acts of bad conduct which were criminal, or morally wrong. *Held*, that the allowance of such interrogatories was properly refused by the judge.

The character or credibility of a witness cannot be impeached by showing particular acts of immorality or bad conduct.

APPEAL from an order made by a judge at chambers, and

entered, refusing to settle and allow certain interrogatories proposed to be attached by the defendants to a commission to be issued for the examination, on their behalf, of foreign witnesses. The action was brought to recover the value of certain services rendered to the defendants by the plaintiff, while in their employment at Nicaragua and elsewhere, between September, 1855, and January, 1858. The defence set up was, that the defendants had paid the plaintiff in full for the services so rendered. On the application of the defendants a commission had been allowed to issue, to examine certain witnesses in Canada; but the allowance was unaccompanied by any stay of proceedings. On the presentation for settlement, to the judge at chambers, of the interrogatories on the part of the defendants proposed to be attached to the commission, it was insisted, on behalf of the plaintiff, that the subjects inquired of in no way related to the issues to be tried in the action; and thereupon the counsel for the defendants conceded that the object of the interrogatories was to inquire respecting certain alleged acts of bad conduct of the plaintiff while in Canada, many years previous to his employment, and which were criminal, or were morally wrong. The right to put these questions was placed upon the ground that their answers would have the effect of impeaching the character or credibility of the plaintiff, in case he should offer himself as a witness at the trial in his own behalf. The allowance was refused for the following reasons:

HILTON, J.—Although it is usual to grant an order for a commission upon the application of either party, where no stay is desired, almost as a matter of course, yet, upon the settlement of the interrogatories, the judge, if required, should look into the questions propounded, to see if they relate to the matters at issue, and to be tried in the action. And it is not necessary, upon such occasions, to show with absolute certainty that the subjects inquired of will be material at the trial; it will be sufficient if a reasonable ground exists for supposing that such will be the case. 2 R. S. 394, §§ 11, 14, 15.

Romaine v. Kinshimer.

The doctrine of *stare decisis* has no applicability to a prior decision upon a question of jurisdiction, where it plainly appears that the decision was founded upon a mistaken reading of a statute.

The case of *Davis* v. *Hudson* (5 Abbott P. R. 63) disapproved.

AT SPECIAL TERM, *April* 20, 1858.

Motion to dismiss an appeal taken on behalf of Kinshimer, a tenant, to the general term of this court, from a determination made by a justice of a district court, in a summary proceeding by Romaine, as landlord, to recover the possession of certain premises in the occupation of Kinshimer.

M. L. Lanman, for the motion.

C. Bainbridge Smith, opposed.

HILTON, J.—Under the provisions of the Revised Statutes, (2 R. S., art. 2, title 10, ch. 8, part 3, p. 512), proceedings were instituted by Romaine, as landlord, before a justice of one of the justices' courts in this city, to remove Kinshimer, as tenant of certain premises in Fourth avenue. A summons having been issued, the tenant filed an affidavit with the justice denying the facts alleged in the affidavit of the landlord, upon which the proceedings were based, and the matters thus controverted were tried before a jury. A verdict and judgment having been rendered in favor of the landlord, the tenant appealed therefrom to this court. An application is now made, on behalf of the landlord, to dismiss the appeal thus taken, upon the ground that it is unauthorized by law, and that this court has no power to review proceedings of this nature.

In *Davis* v. *Hudson*, (5 Abbott P. R. 63), at a general term of this court held by two of the then judges, (July term, 1857), it was determined that section 352 of the Code of 1857 authorized an appeal of this character, and, therefore, it is argued, the question as to whether the jurisdiction to entertain such an appeal does or does not exist is *res adjudicata*, so far as this court is concerned, and consequently is not the subject of review.

It is manifest, however, that the decision was erroneous, and not warranted by the plain construction of the statutes to which in it reference is made. Section 352 of the Code, upon which that decision is based, in no way relates to special proceedings of this kind, but, on the contrary, applies *only* to "*appeals in civil actions.*" It forms a part of chap. 5, title 9, of the *second* part of the Code, which, by sections 1, 2, 3, &c., is *expressly limited to civil actions*, and which, by section 471, it is declared shall not affect any proceedings provided for by chap. 8 of part 3 of the Revised Statutes, excluding the 2d and 12th titles thereof. *Benjamin* v. *Benjamin*, 1 Seld. 383. If the error thus shown consisted of anything beyond that of a clearly mistaken reading of a statute, upon a question of *jurisdiction alone*, we should not consider it open to review in this court, but would feel bound to adhere to it upon the doctrine of *stare decisis*. But as no particular principle of law is involved in that decision, beyond the reading of a particular statute, and as adhering to it would impose upon us the duty of entertaining appeals in proceedings where it is clear this court has no jurisdiction whatever, I am satisfied that the doctrine of *stare decisis* has no applicability to such a case, and does not preclude us from acknowledging so obvious an error, and hereafter disregarding it as in any way binding.

There cannot be a doubt that the only method of reviewing a proceeding of this nature, in the city of New York, is by a writ of *certiorari* issuing from the Supreme Court, (see 2 R. S. 516, §§ 47, 48; *The People, &c.* v. *Willis*, 5 Abbott P. R. 205), and I therefore feel bound to declare that the appeal here taken is unauthorized by law, and void, and for that reason should be dismissed.

In this opinion all the present judges of this court concur.

Motion to dismiss appeal, granted.

CHARLES MOORE *v.* JAMES C. WILLETT, SHERIFF, &c.

A sole acting executor can maintain an action respecting the property of the testator.

In actions by or against executors, it is not necessary to join, as parties, those named as executors in the will, but to whom letters testamentary have not been granted, and who have not qualified.

AT SPECIAL TERM, *May* 31, 1858.

Motion to continue an action in the name of the acting executor of a deceased plaintiff.

William Venvill, for the motion.

Brown, Hall & Vanderpoel, opposed.

HILTON, J.—This action is brought to recover damages for the unlawful taking and carrying away, by the defendant, of certain goods of the plaintiff. Upon proof of the death of the plaintiff, leaving a will by which he nominated Samuel Moore and William Wright his executors, and that letters testamentary had been granted thereon to Moore as sole acting executor—Wright having declined to act or qualify—a motion is now made to permit the action to continue in the name of the acting executor as plaintiff. The cause of action being one that survives the death of a party, there can be no reason for denying the application, unless, as is urged by the defendant, it is not made by the proper parties. Code, § 121.

The case of *Bodle, Acting Executor, &c.* v. *Hulse* (5 Wendell, 313,) was cited on the argument, as being conclusive upon the question that, where there are several executors, they must all join in the prosecution of the action, even though some renounce.

Although this was the former practice, and in the case cited it was held that an acting executor could not alone maintain an action respecting the property of the testator, yet the difficulty

presented by such a rule was subsequently obviated by Laws of 1838, (ch. 149, p. 103), which expressly provide that, in actions brought by or against executors, it shall not be necessary to join those, as parties, to whom letters testamentary shall not have been issued, and who have not qualified. 2 R. S. (4th ed.) 298, § 2.

Motion granted.

The People of the State of New York *v.* John Petry and William Mulligan.

A judgment entered with the county clerk, upon a forfeited recognizance, becomes subject to the jurisdiction and control of this court to the same extent as if it had been docketed in it.

In addition, the court has the discretionary power to remit the forfeiture in whole or in part, or to discharge the recognizance upon such terms as appear just and reasonable.

In the exercise of this discretion, the court will look into the proceedings at the time the forfeiture was declared, to ascertain whether the party was fairly entitled to a postponement of the trial; but, *it seems*, this will not be done until he has submitted himself to trial and judgment upon the indictment against him.

In criminal cases, it is at all times discretionary with the court whether it will proceed or not in the absence of the defendant, and if he is called at any stage of the trial, and fails to appear and answer, his recognizance may be declared forfeited.

It seems, that no person indicted for any offence can be tried unless he be present in person, or by an attorney acting under a distinct and express authority given for the purpose.

Upon applications for a remission of a forfeited recognizance, it should appear that the bail has in no way connived at the escape of the party indicted, and also that reasonable efforts have been made to apprehend and surrender him.

When this is not shown, the application will be denied.

At Special Term, *July* 30, 1858.

Motion to vacate a judgment entered upon a forfeited recognizance, and to remit the forfeiture. The grounds upon which the application was based, fully appear in the opinion.

James M. Smith, jr., and Theodore E. Tomlinson, for the motion.

John Sedgwick, assistant district attorney, opposed.

HILTON, J.—The defendant Mulligan was indicted by the grand jury of this county for an assault and battery on Hiram A. Webb. He appeared before the recorder, and, with the defendant Petry as surety, entered into a recognizance in the sum of $1,000, conditioned that he should personally appear and answer to the indictment, and abide the order of the Court of General Sessions of the Peace, and not depart therefrom without leave. The trial was ordered to take place on the 9th of July, instant, when he appeared with his counsel, and presented to the court affidavits to the effect that material witnesses for his defence were absent, and that without them he could not safely proceed to trial. The recorder, however, directed the case to proceed, and a jury was impanneled; but before the trial actually commenced Mulligan left the court without leave, and upon being called, failed to appear or answer, and the recognizance was thereupon declared forfeited. Judgment having been entered upon this forfeiture, and docketed with the county clerk, it became subject to the jurisdiction and control of this court in the same manner as other judgments, and as if it had been docketed in the court. Laws of 1845, ch. 229, p. 250. And, in addition, the power is conferred upon us (Laws of 1818, p. 307; Laws of 1854, ch. 198, p. 464, § 6,) to remit all or any part of such forfeiture, or to discharge such recognizance upon such terms as shall appear just and reasonable.

The defendants apply to have this judgment vacated, and the forfeiture remitted, upon the following grounds:

1st. That, upon the affidavits presented, the Court of Sessions should have postponed the trial, and ought not to have ordered it to proceed in the absence of material witnesses for the defence.

2d. That, Mulligan's attorney having appeared for him, it was not necessary, nor was he bound, to be present in person, and for this reason the court erred in directing the recognizance to be forfeited.

3d. That the surety, by producing the defendant Mulligan in court at the time the trial was ordered to proceed, became discharged from all liability upon the recognizance.

Under the wide jurisdiction and discretion conferred upon us, in respect to judgments of this nature, there cannot be much doubt that we may look into the proceedings, and the affidavits used upon the motion on the part of the defendant, to postpone the trial, to ascertain whether the facts shown were such as fairly entitled him to such postponement; but there is a manifest impropriety in our doing so before the defendant has appeared and submitted himself to trial and judgment upon the indictment. At present I decline to do so in this case.

The counsel is mistaken in supposing that, upon the trial of an indictment for a misdemeanor, the defendant has the option to attend or not, as he may choose. It is true, that, at common law, the trial might proceed in his absence, provided he had once appeared; (4 Black. Com. 368); but our statutes (2 R. S. 734, § 13) provide that no person, indicted for any offence, can be tried unless he be present, either personally, or by his attorney *duly authorized for that purpose.* And in the case of *The People* v. *Wilkes* (5 Howard P. R. 104,) it was held that the general authority of an attorney or counsel in the cause was not sufficient. There must be a distinct and express authority given for the purpose, and an unequivocal waiver of the defendant's right to be present, before the trial can proceed. But, apart from this, in criminal cases it is at all times discretionary with the court whether it will proceed or not in the absence of the defendant, and if he is called at any stage of the trial, and fails to appear and answer, his recognizance may be forfeited. 2 Bennett & Hurd's Crim. Cases, 454.

In respect to the third ground, it is sufficient to say, that the recognizance was upon condition that Mulligan should personally appear to answer the indictment "and abide the order of the court, *and not depart therefrom without leave,*" thus providing against the very contingency which happened in this case.

Finally, as a general rule, applications of this nature should

not receive any favor at the hands of the court, unless it is made to appear that the surety or bail has in no way connived at or consented to the escape, and, in addition, that every reasonable effort has been made to apprehend the principal, and surrender him up for trial. This, it seems, is in the power of the defendant Petry at any time to do, as the affidavits read by the district attorney show that Mulligan is now living at Hoboken in New Jersey, liable at any moment to be seized by his bail and brought to this city.

For these reasons the motion is denied.

GEORGE W. WOODWARD *v.* GEORGE C. GENET.

A written instrument, in the usual form of a bond, but without seal, should be regarded as a promissory note.

In an action upon such an instrument, it was shown to have been given for an actual indebtedness: *Held*, that the plaintiff was entitled to judgment upon it.

AT SPECIAL TERM, *August* 7, 1858.

Trial before a judge without a jury. The action was brought upon a written instrument in the usual form of a bond, but without seal, conditioned for the payment of $35,000 in certain instalments. The defence was, substantially, that it created no obligation or liability, as no consideration appeared upon its face. At the trial the plaintiff was permitted to show that it was accompanied by a mortgage, given for part of the consideration for the conveyance by the plaintiff to the defendant, of certain lands in the state of Pennsylvania.

E. W. Stoughton, for the plaintiff.

Charles P. Kirkland, for the defendant.

HILTON, J.—This action was tried before me at special term without a jury. The defendant having offered no testimony, it

is to be determined whether the instrument described in the complaint, and which is in the usual form of a bond, but without seal, is any evidence whatever of an indebtedness. Its plain import is, that at the times specified the defendant will pay to the plaintiff certain sums of money; and although it is not in the usual form of promissory notes, yet there can be no doubt that it is such, judged either by the rules of the mercantile law, or by the provisions of the Revised Statutes. 1 R S. 768, § 1; *Fisher* v. *Leslie*, 1 Esp. R. 426; *Israel* v. *Israel*, 1 Camp. 499; *Casborne* v. *Dutton*, 1 Wheaton's Selwyn's N. P. 289; *Shuttleworth* v. *Stevens*, 1 Camp. 407; Bayley on Bills, 5; *Chadwick* v. *Allen*, Strange R. 706; Byles on Bills, 3; *Kimball* v. *Huntington*, 10 Wend. 675, 679; *Luqueer* v. *Prosser*, 1 Hill, 256; *Bruce* v. *Westcott*, 3 Barb. S. C. 374; *Curtis* v. *Leavitt*, 15 N. Y. R. 1, 73, 156.

But in addition to the presumption of indebtedness or consideration, which the law implies from all instruments of this character, the proof shows that it was actually given in part payment of the purchase money of certain land in Pennsylvania, conveyed by the plaintiff to the defendant. So that, whether it is regarded as a promissory note, or as an acknowledgment of a promise to pay an indebtedness actually owing by the defendant, it is clear that, upon the whole case, the plaintiff is entitled to judgment for the two instalments due by the terms of the instrument, amounting to $10,000, together with interest, at 7 per cent. per annum, upon the sum of $35,000, from February 17th, 1857.

The clerk will compute the interest, and enter judgment accordingly.

JOHN CODDINGTON, EXECUTOR OF SUSAN AYRES, DECEASED, *v.* THOMAS CARNLEY, LATE SHERIFF.

When a case has been fairly submitted to a jury, their verdict will not be set aside merely because it seems to be against the weight of the evidence.

To justify the court in setting aside a verdict as being against the weight of evidence, the preponderancy should be so great as to warrant the conclusion that the verdict must have been the result of prejudice, passion, undue bias, or corruption on the part of the jury.

That their finding seems to be in opposition to the views expressed in the charge of the judge, affords no ground whatever for interfering with it.

When the evidence is conflicting, it is the right and province of the jury to determine the questions of fact submitted to them, uncontrolled by the court.

It seems, that the indorsement by the sheriff upon an execution, of a levy made under it, is an official act, and *prima facie* evidence of the facts stated.

An action to recover for goods wrongfully taken by a sheriff under an execution, must be brought within three years from the day the levy was made.

But the period which may elapse between the death of any person and the granting of letters testamentary on his estate, not, however, exceeding six months, and the period of six months after such letters are granted, are not to be deemed a part of such limitation of three years.

AT SPECIAL TERM, *August* 25, 1858.

Motion for a new trial. The plaintiff, as executor of Susan Ayres, deceased, brought this action to recover the value of certain property claimed to have belonged to the testatrix, and which was levied upon and sold by the defendant, in his official capacity, by virtue of an execution against Samuel Carpenter. The defendant set up in his answer a justification for the taking under the execution; put at issue the title of the testatrix and the plaintiff to the property; and, as a distinct defence, claimed that the action had not been brought within three years after the cause thereof accrued. At the trial, evidence was introduced respecting the ownership of the property, and the time when it was levied upon and taken by the defendant. It also appeared that the testatrix died January 10th, 1851; that letters testamentary were granted to the plaintiff March 23d, 1853; and that this action was brought May 19th, 1854. The plaintiff's

testimony respecting the time the levy was made, consisted of several witnesses fixing the date from memory alone, unaided by any memoranda or circumstance calculated to impress the precise day upon their memory with any peculiar distinctness. They concurred, however, in testifying that the levy was made on May 23d, 1851, and that the goods were removed the following day. The witnesses on the part of the defendant, upon this point, consisted of the deputy sheriff who made the levy, and the person who was subsequently put in charge of the property, and afterwards assisted at its removal. The deputy testified from a memorandum made by him on the back of the execution at the time of the levy, and from which he was enabled to state positively that the levy was made on May 2d, 1851. Upon both of the questions thus presented as to the ownership of the property and the time the cause of action accrued, the jury, under a charge of Judge DALY, who tried the cause, calling their attention particularly to the issues to be determined, found a verdict for the plaintiff.

The defendant applied for a new trial on the ground that the verdict is against the weight of evidence, and especially that, as to the time when the levy was made and the cause of action accrued, it is contrary to the charge of the judge.

John E. Burrill, Jr., for the motion.

Levi S. Chatfield, opposed.

HILTON, J.—It is very seldom that a verdict of a jury is disturbed upon these grounds, where the evidence has been fairly submitted; and although the case might show that the weight of the evidence seemed to be with the defendant, yet, to justify the court in setting the verdict aside, the preponderancy should be so great as not only to lead to the belief that injustice had been done, but also to warrant the conclusion that the verdict must have been the result of prejudice, passion, undue bias, or corruption. *Jackson* v. *Loomis*, 12 Wend. 27; Graham on New

Trials, 452; *Diblin* v. *Murphy*, 8 Sand. S. C. 19; *Keeler* v. *Fireman's Ins. Co.*, 3 Hill, 250; *Eaton* v. *Benton*, 2 id. 576; *Collins* v. *Albany & Schenectady RR. Co.*, 12 Barb. 492; *Lee* v. *Schmidt*, 1 Hilton R. 537.

In this case the questions determined by the jury were proper to be submitted to and passed upon by them; and although some reason exists for saying that the finding in respect to the time of the levy was contrary to the charge of the judge, yet that affords no ground whatever for interfering with the verdict. *Astor* v. *Union Ins. Co.*, 7 Cowen, 202. The indorsement of the levy on the execution was an official act of the deputy, and was *prima facie* evidence of the facts contained in it; standing alone, it would be conclusive; but, like all such evidence, it might be controverted by other testimony. Such was introduced in this case, and, taken in connection with the fact that the goods were sold by the defendant on June 3d, 1851, upon a previous notice of six days, and which notice it is reasonable to presume was given shortly after the removal of the goods, the jury evidently considered the testimony of the plaintiff's witnesses entitled to greater weight than that of the deputy sheriff, aided by his entry on the execution. *Glover* v. *Whittenhall*, 2 Denio, 633; *Cornell* v. *Cook*, 7 Cowen, 310.

The evidence, we have seen, was conflicting; but none of the witnesses were impeached, and it was the right and province of the jury to determine the questions presented for their consideration, uncontrolled by the court. I can therefore see no reason for disturbing their verdict upon the ground that it is against the weight of evidence.

In conclusion, I may be permitted to say that it seems to me undue importance was attached, not only at the trial but on the argument of this motion, to the testimony in respect to the particular day on which the levy was actually made by the deputy of the defendant. Whether it was made in the fore part or the latter part of May, 1851, ought not, in my judgment, to have any controlling influence in determining whether this action was brought within the time limited by statute.

It is true that this is one of that class of actions required to be brought within three years after the cause thereof accrued, and which would be the day the levy was made, (Code, § 92); but by § 9 of 2 R. S. 448, it is declared that the period which may elapse between the death of any person and the granting of letters testamentary on his estate, not exceeding six months, and the period of six months after the granting of such letters, shall not be deemed any part of the time limited by any law for the commencement of actions by executors.

Now, in this case it is assumed, and indeed proven by both sides, that the levy was actually made in *May*, 1851. The testatrix died in January previous. Letters testamentary were not issued within six months after her death, and consequently, by this provision of the Revised Statutes, the plaintiff might have brought his action at any time in May, 1851, or even several months later, and the Statute of Limitations would be no bar to his recovery. *Nelson* v. *Lounsbury*, 3 Barb. S. C. 125; *Babcock* v. *Booth*, 2 Hill, 181.

Motion for a new trial denied, with costs.

ROBERT E. KELLY AND OTHERS *v.* DAVID F. BAKER, ADOLPHE REYNAUD AND JULES LIGNOT.

An assignment for the benefit of creditors, with or without preferences, made by one or more members of a firm, without the consent, concurrence, or authority of all, is void.

What constitutes such an authority, considered.

B. and R. were copartners. B., after collecting part of the assets of the firm, absconded, and, by letter, abandoned the remaining assets to R., who executed, in the name of the firm, a general assignment for the benefit of the creditors. *Held*, that such a surrender and abandonment invested R. with power thus to dispose of the partnership property.

Where such an authority can fairly be implied from facts and circumstances, courts of equity will uphold acts done under it.

At Special Term, *September* 25, 1858.

Motion for an injunction and receiver. The plaintiffs were judgment creditors of the firm of Baker & Reynaud, and an execution on their judgment had been duly returned unsatisfied. On a complaint showing these facts, and alleging that Reynaud, without the consent or concurrence of Baker, had, by a general assignment, transferred all the property of the firm to the defendant Lignot, for the benefit of creditors, and without preferences, application was made for a receiver of all the property thus transferred, and an injunction restraining the defendants from interfering with it. The opposing affidavits showed that Baker had departed secretly for California, after having collected a large amount of debts owing to the firm, and leaving, addressed to his partner, the letter set out in the opinion. It further appeared that the firm was largely insolvent, and that the assignment had been made in good faith, for the purpose of securing to the creditors an equal share of the property of the partnership.

Richard O'Gorman, for the motion.

William H. Jansen, opposed.

Brady, J.—An assignment for the benefit of creditors, with or without preferences, made by one or more copartners, without the concurrence, consent, or authority of all, is absolutely void; (*Wetter* v. *Schlieper*, 4 E. D. Smith, 707); and in this case, therefore, the only question presented is, whether the copartner making the assignment had authority thereto. On that subject the papers on which this motion is made disclose the following letter from the dissenting partner, written to his associate, and received prior to the assignment:—

November 13, 1857.

Adolphe Reynaud, Esq.:

Dear Sir,—I tried in every way to make some arrangements

to prevent the failure of our concern; but, being disappointed in my last hope, I could not bring myself to bear the disgrace of a failure; I became disheartened and in despair, so I concluded to abandon all to you, and try to make a living by seeking my fortune in California, or some other place; and some future day I hope to *return* with sufficient means to pay every debt we owe. Please tell all that we owe that they shall be paid every dollar, with interest. I hope you may get some one to advance means enough to carry on the business prosperously. I have lost, by loaning money on stocks, notes, &c., some $20,000 and upwards I felt as if I did not care to live, after having everything that I had worked hard to accumulate stripped from me. Hoping that you may get along better *without me*, I subscribe myself

Yours, &c.,

D. F. BAKER.

It will be perceived that Mr. Baker "concluded to abandon all" to his copartner, and "to try to make a living by seeking his fortune in California, or some other place." This language imports two operations of the mind—one investing his copartner with the whole of the copartnership effects, and the other a determination to seek a livelihood in a distant place, and to yield all control over the partnership property. The partner, thus invested by the surrender of his associate, had power to dispose of the interest of that associate for the best general interest of both, and having made an assignment for the benefit of creditors, without preference, no abuse of the power has taken place, and the assignment should not be disturbed. See *Kemp* v. *Carnley*, 3 Duer, 1.

Where a power is conferred upon one of several partners to assign the copartnership assets for the benefit of creditors, or such authority can be fairly and justly implied from facts and circumstances, or either, and it be employed as designed, it will not be abrogated by courts of equity. There are, perhaps, in this case, circumstances which contribute much to show an intent on the part of Baker to grant his associate full power and

authority to make a general distribution of the partnership effects; but I deem the letter referred to sufficient to uphold the assignment, and decline to allow the injunction.

Motion denied.

William Goodall *v.* William J. Demarest.

Upon a proper affidavit, an order for a second examination of a judgment debtor will be granted *ex parte*.

Where a judgment debtor has been examined under supplementary proceedings, another examination will not be ordered unless the affidavit upon which it is applied for, mentions the previous proceeding, and shows that the debtor has since acquired property, or states circumstances leading to such a belief.

An order for a second examination was obtained upon an affidavit deficient in these respects; but on a motion to vacate it the omission was supplied, and the order was retained, limiting the inquiry, however, under it, to matters subsequent to the examination already had.

At Chambers, *September* 25, 1858.

Motion to vacate an order for the examination of the defendant, a judgment debtor, under proceedings supplementary to execution. The affidavits on which the motion was grounded, showed that the defendant had been once fully examined under a previous order granted upon the same judgment, and no property discovered; and alleged that the last order had been obtained for the purposes of vexation and annoyance. In opposition to the motion, an affidavit was produced stating circumstances which would naturally lead to the belief that the defendant was now possessed of property, and denying any intent to vex and annoy, further than a proper examination of a debtor might be supposed to have such an effect. The affidavit upon which the second order was obtained, was in form the usual printed blank, filled up, and in it no reference was made to the previous examination, nor to the fact that the defendant had subsequently acquired property.

John M. Martin, for the motion.

John B. Holmes and William McKeag, opposed.

BRADY, J.—If there has been an examination of the judgment debtor, and the creditor seeks a further examination, the affidavit on which the order is asked should state the previous proceeding, and the fact that the defendant had subsequently acquired some property, or circumstances from which such fact should be presumed. A multiplicity of examinations will not be tolerated without good reasons therefor, but, at the same time, no judgment creditor will be prevented from *bona fide* efforts in these proceedings to obtain satisfaction of his judgment. The affidavit on which the second order was obtained herein, is deficient in the respects named, but is not deficient in any jurisdictional fact. The omission is, therefore, one of practice, which may be supplied by amendment. The affidavit read in opposition to the motion to discharge the order, discloses circumstances which justify, in my judgment, the belief that the debtor has acquired property since the last examination, and the order will be retained, therefore, fortified by the affidavit mentioned. The question of the defendant's costs on this motion, is reserved until the conclusion of the examination to take place. And further, the defendant's examination must be limited to the time when the previous one was concluded. I do not concur in the proposition that no subsequent order should be granted except upon notice to the defendant. The creditor proceeds at his peril, and the costs allowed by the statute must be his indemnity if he be improperly required to appear. A hearing upon notice would necessarily involve the question of property, in respect to which the right to examine is given by statute, subject to the rules of practice relating thereto, and if decided in favor of the applicant, would subject the judge conducting the proceeding to another consideration of the same question upon the examination when finished.

Ordered accordingly.

ISAAC MOSES v. GIDEON L. WALKER.

In an action by a mortgagee of chattels to recover the value of a part of the mortgaged property, wrongfully taken from the possession of the mortgagor, it is not necessary to allege in the complaint that the mortgage was duly filed in the county where the property was situated.

The provisions of the Revised Statutes respecting the filing of chattel mortgages, are for the protection of the creditors of the mortgagor, and purchasers in good faith, and not for the benefit of wrongdoers.

In an action to recover for the wrongful taking of property, it is not necessary to allege in the complaint, or prove at the trial, that a demand of it was made before suit brought.

The demand for relief attached to a complaint, affords no ground for a demurrer.

AT SPECIAL TERM, *November* 2, 1858.

Demurrer to a complaint. The nature of the action and the character of the pleadings sufficiently appear in the opinion.

Malcolm Campbell, for the plaintiff.

Gideon L. Walker, defendant, in person.

HILTON, J.—The plaintiff alleges in his complaint, that he is mortgagee of certain household furniture in 25th street in this city, by virtue of a chattel mortgage executed, and on May 13th, 1858, duly filed in the register's office; that the amount secured by the mortgage is due and unpaid, and he is entitled to the possession of the property described in it; that part of such property the defendant wrongfully took from the possession of the mortgagor while it was in his custody, and "has refused and still refuses to deliver the same or any part thereof" to the plaintiff's damage, &c.

To a complaint containing substantially these averments, the defendant demurs: 1st. That it does not state facts sufficient to constitute a cause of action; and 2d. That several causes of action have been improperly united.

Upon the argument it was insisted, under the first ground of demurrer, that the complaint was defective in not showing that the mortgage was filed in the county where the mortgagor resided at the time of its execution, (2 R. S. 136, § 9), and in not alleging a demand and refusal before suit brought.

The answer to this argument is, that the provisions of the Revised Statutes are not intended for the benefit of parties acquiring property wrongfully, and to which they have no claim or right; but to protect creditors of the mortgagor and subsequent purchasers, or mortgagees in good faith,—as to whom the mortgage is declared to be void unless filed in the manner prescribed. *Meech* v. *Patchin*, 4 Kernan, 71.

As to the other objection, there is no force whatever in it. The defendant, by his demurrer, admits that he wrongfully took this property from the mortgagor's possession; that the plaintiff is the owner of it by virtue of the chattel mortgage given to him, now due and unpaid; and that he, the defendant, has refused, and "still refuses" to deliver it, to the plaintiff's damage, &c. In a case of this character, if a demand was necessary before suit brought, these allegations would seem to be sufficient to entitle the plaintiff to maintain his action. But it is well settled that, in an action against a wrongdoer for a wrongful taking of property, no demand need be proved, and therefore it was unnecessary here to allege it. *Pringle* v. *Phillips*, 5 Sand. S. C. 157; *Zachrisson* v. *Ahman*, 2 Sand. S. C. 68; *Stillman* v. *Squire*, 1 Denio, 327.

To maintain the second ground of demurrer, the defendant rests entirely upon the prayer of the complaint, and claims that it shows two causes of action to have been improperly united. The answer to this view is, that the complaint shows but a single cause of action, and the plaintiff has added to it a demand of the relief to which he supposes himself entitled, (Code, § 142, sub. 3), and although he has asked for much more than the law would award him, yet that cannot affect the defendant, nor afford him a ground for demurrer. *Andrews* v. *Schaffer*, 12 How. Pr. R. 441. It shows neither a right in the plaintiff nor a wrong on

the part of the defendant, and does not add to or alter the cause of action stated in the complaint. Its general effect is to limit the plaintiff in the relief which can be awarded him if there should be no answer. Code, § 276; *Marquat* v. *Marquat*, 2 Kernan, 336. His rights are in no way enlarged by it, and it works no prejudice or injury to the defendant.

Judgment for plaintiff on the demurrer, with costs.

CHARLES LULING *v.* GEORGE STANTON AND WILLIAM RUGER.

In an action against a common carrier, to recover special damages caused by his refusal to carry and transport merchandise, in pursuance of a contract made therefor, the summons should be for relief under sub. 2, § 129 of the Code.

Although the actual loss is specifically stated in the complaint, and judgment therefor is demanded, yet the claim is composed of unliquidated damages.

Sub. 1 of § 129 relates to contracts which in terms provide for the payment of money.

AT SPECIAL TERM, *January* 20, 1859.

Motion to set aside a complaint, upon the ground that the cause of action stated in it did not conform to the summons served. The summons was, in form, for relief under sub. 2 of § 129 of the Code. The complaint set out, as a cause of action, the making by the defendants of a special contract, whereby they agreed to carry and transport for the plaintiffs certain freight, from Bremen to New York, at a specified rate. That the freight was offered to them and they refused to accept it, whereby the plaintiffs were obliged to procure other means of transportation, at an increased expense beyond the contract price. The costs, charges and expenses arising out of the refusal of the defendants to perform their contract, were specifically set out, and the complaint concluded by a demand for judgment for $1,000, being the damages alleged to have been thus actually sustained, with interest, &c.

Benjamin F. Mudgett, for the motion.

I. An action to recover damages for a breach of special con-

tract, as, for example, common carrier to carry and deliver goods, is within the 1st subdivision of § 129 of the Code, and is for the recovery of money. *Trapp* v. *N. Y. and Erie RR. Co.*, 6 How. P. R. 237.

II. Where the complaint sets out a contract and breach of it, as the cause of action, and prays judgment only for the recovery of a specified sum and interest, it is an action arising on contract. It is within subdivision 1, § 129. It is not necessary that the contract should be one stipulating in terms for the payment of money. *Croden* v. *Drew*, 3 Duer, 654.

III. If the summons indicates a cause of action, within a subdivision, not warranted by the prayer in the complaint, it is irregular. *Ridder* v. *Whitlock*, 12 How. P. R. 208; *Voorhies* v *Scofield*, 7 How. 51.

Lane & Roelker, opposed.

I. In all claims for unliquidated damages for the breach of specific agreements, application must be made to the court. *Flynn* v. *The Hudson R. RR. Co.*, 6 How. P. R. 308; *Clor* v. *Mallory*, 1 Code R. 126. 1. This is clearly an action for unliquidated damages. There can be no certainty in the amount which the plaintiff is entitled to recover, but it is an action to establish or ascertain the plaintiff's right to damages, which are to be paid in money.

II. The first subdivision of § 129 of the Code would obviously be improper; it can only be applied to actions for the recovery of a definite sum. Those actions, requiring the court to take proof, and depending upon other considerations than such as appear in the contract itself, are not to be deemed actions for the recovery of money only, and are to be brought by a summons under the second subdivision of § 129. *Tuttle* v. *Smith*, 6 Abbott P. R. 329; *Dunn* v. *Bloomingdale*, 6 Abbott, 340; *People* v. *Bennett*, 6 Abbott, 244; *McNeff* v. *Short*, 4 How. P. R. 463.

BRADY, J.—The summons in this action is in the proper form. The action against a common carrier is usually an action for a

wrong, and not strictly upon contract, (per TAGGART, J., *Campbell* v. *Perkins*, 4 Selden, 438), and the claim made is composed of unliquidated damages. Such is the case here. The plaintiff states his damage distinctly and definitely, and asks judgment for the aggregate sum. It is his own estimate, however, and it is not provided for by the contract. The first subdivision of § 129 relates to contracts which in terms provide for the payment of money. This was the view of the late Justice BARCULO, (8 How. P. R. 505), and, in my opinion, is the true interpretation of the statute. The following cases sustain the opinion expressed of the proper form of the summons herein: *Tuttle* v. *Smith*, 14 How. 395; *Dunn* v. *Bloomingdale*, id. 475; *McNeff* v. *Short*, id 463; *Clor* v. *Mallory*, 1 Code Rep. 126; *Flynn* v. *Hudson River RR. Co.*, 6 How. 310.

The motion is therefore denied, but without costs, the authorities being somewhat in conflict on the question.

HENRY HURD *v.* JACOB MILLER.

No action will lie for injuries arising from a trespass upon real property, where the premises are situated in another state.

The action for use and occupation only lies where the occupant went into possession by permission of the landlord, or where there exists between them the relation of landlord and tenant, under an agreement express or implied.

It cannot be maintained where it appears that the occupant wrongfully entered upon, and took possession of the premises.

AT SPECIAL TERM, *January* 20, 1859.

Demurrer to a complaint. The complaint was in the following form:

"That, during the year 1857, he (said plaintiff) was the lessee and tenant of a certain lot of land in Hudson city, state of New Jersey, containing about six acres, said lot being a vacant lot, used as a cattle yard and pasture, and situate in said city near

and between the court house and the residence of Judge E. T. Carpenter, and near and between Newark avenue and the Hoboken road. That while plaintiff was such tenant and lessee of said lot, in and about the month of May in said year 1857, the defendant wrongfully entered upon and took possession of said lot, and continued in the wrongful use and occupation thereof, using the same as a cattle yard and pasture from that time to in or about the month of October in the same year, a period of about six months; and plaintiff says that said use and occupation of said lot was well worth the sum of one hundred and fifty dollars, but that defendant has never paid the same, nor any part thereof, nor any sum whatever, and is justly indebted to plaintiff in that amount for said wrongful use and occupation, with interest from the first day of November, 1857 Wherefore plaintiff demands judgment against defendant for said sum of one hundred and fifty dollars, with interest."

The defendant demurred, and stated the following to be his grounds of demurrer:

1st. Plaintiff seeks to recover for a trespass committed in another state. 2d. That two actions are improperly joined in this action. 3d. The complaint does not show that the plaintiff is the proper party to sue. It does not show that the plaintiff is the owner of the premises, or has a legal right thereto, or that he was in possession thereof. It does not sufficiently describe the premises which the plaintiff alleges the defendant committed a trespass upon. 4th. That the complaint does not state facts sufficient to constitute a cause of action.

Beebee, Dean & Donohue, for the defendant.

I. The complaint seeks to maintain an action of trespass, for wrongfully entering upon and taking possession of real estate, situate in the state of New Jersey, of which plaintiff claims he was tenant and lessee. 1st. An action cannot be maintained in this state for a trespass committed on real estate in another state. State courts have no jurisdiction. *Watts* v. *Kinney*, 23 Wend. 484, affirmed 6 Hill, 82. Such actions are local; they have been

so in England, and are now. 1 Chitty's Pleadings, 268, and cases cited; also *Doulson* v. *Matthews*, 4 Term Rep. 503; Story on Conflict of Laws, §§ 365, 554, 555, and cases cited. 2d. If this was the common law, certainly it must now prevail in the absence of any statute to the contrary. 3d. Even the Code cannot prescribe the place of trial in such actions, where the property lies out of the state.

II. The complaint also, in the demand for judgment, seeks to recover for the use and occupation of said premises, and in an indirect manner joins the two actions of trespass, and use and occupation in one action. 1st. An action for use and occupation cannot be maintained, for the complaint on its face shows that the defendant wrongfully entered upon and forcibly took possession of said premises. To sustain an action for use and occupation, the relation of landlord and tenant must be shown to exist by the pleadings. 1 Chitty's Pleadings, 106; 13 Johns. Rep. 240; id. 489; *Smith* v. *Stewart*, 6 Johns. Rep. 46, and cases cited; Cowen's Treatise (4th ed.) 335. 2d. An agreement to sustain the relation of landlord and tenant, cannot be implied, but must be proven, either by the payment of rent, or a permission by the landlord, under some previous agreement. Chitty on Contracts, 370 to 373, and cases cited. 3d. The actions of trespass, and use and occupation, cannot be joined. Code, § 167. The complaint in this action, even if the two actions could be joined, does not sufficiently separate them. *Getty* v. *Hudson River RR. Co.*, 8 How. Pr. R. 177.

William H. Green, for the plaintiff.

I. The action is on contract upon *quantum meruit*, for occupation of premises. The tort is waived, and so far as it is alluded to, is irrelevant matter, which may be stricken out. It is not ground of demurrer. A contract at common law is "any description of agreement, obligation or legal tie, whereby one party binds himself or becomes bound, expressly or impliedly, to another, to" &c., &c. Chitty on Contracts, 2. In many cases it is

a mere inference or conclusion of law from the legal liability. Gould Pl. 330.

II. Contracts follow the person, and may be enforced against the debtor, in any state where the action by its own laws is maintainable. The remedy is controlled by the *lex fori*. *Andrews* v. *Hericott*, 4 Cowen, 508. If the contract concern lands in another state, our courts will construe it according to the *lex loci*. *Abell* v. *Douglass*, 4 Denio, 305. An action for use and occupation is transitory. *Corporation N. Y.* v. *Dawson*, 2 Johns. C. 335; *Law* v. *Hallett*, 2 Caines', 374. This action is analogous to the common law action for mesne profits, (*Smith* v. *Stewart*, 6 Johns. 46), which was before the Code in form in assumpsit, (Graham's Pr. 691, 692), and judgment therein was rendered as in actions of assumpsit for use and occupation. Code, § 167, sub. 5; *Cropsey* v. *Sweeny*, 7 Abbott Pr. 129.

BRADY, J.—Assumpsit will lie at common law for rent upon an express, but not upon an implied promise, (Buller's N. P. 138; 3 Lev. 150; *Featherstonhaugh* v. *Bradshaw*, 1 Wend. 135), even where the use and occupation was by permission of the plaintiff. *Lewis* v. *Wallace*, Buller's N. P. 139. By the Revised Statutes any landlord may recover, in this form of action, a reasonable satisfaction for the use and occupation of any lands or tenements, by any person under any agreement not made by deed; (1 R. S. 478, § 26); and it has been held that this statute applied only to the case of a demise, and when there existed the relation of landlord and tenant, founded on some agreement express or implied. *Smith* v. *Stewart*, 6 Johns. R. 36; *Osgood* v. *Dewey*, 13 Johns. R. 240; *Abeel* v. *Radcliff*, id. 297; *Bancroft* v. *Wardwell*, id. 489; *Featherstonhaugh* v. *Bradshaw*, *supra*; *Wood* v. *Wilcox*, 1 Denio, 87.

If the plaintiff had alleged in his complaint that the defendant used and occupied his premises, and had claimed a sum as a reasonable satisfaction therefor, that might possibly have been sufficient to sustain his action, but he repudiates the relation of landlord and tenant, by alleging that the defendant wrongfully

entered upon and took possession of his lot, and continued in such wrongful use and occupation for the period named. He treats the defendant as a trespasser, and yet claims to recover for the wrongful use and occupation of the premises mentioned. He cannot recover for the trespass, because it was committed in another state (*Watts' Adm'rs* v. *Kinney*, 23 Wend. 484); or for the use and occupation, because he disclaims any agreement upon which such an action could be based. The defendant is therefore entitled to judgment, but the plaintiff has liberty to amend in ten days, on payment of costs.

Ordered accordingly.

JOHN TOWNSEND *v.* WILLIAM KEENAN.

After an appeal from the Marine or district courts has been once noticed for argument by either party, and regularly placed on the calendar, it remains thereon without further notice, and until finally disposed of by the court.

An appeal from a district court was noticed for argument, and placed on the calendar by the appellant. On the case being called, at a subsequent term, the appellant not appearing, the judgment appealed from was affirmed by default, on motion of the respondent, and without any proof being required of his having noticed the appeal for argument; *Held*, regular.

AT SPECIAL TERM, *March* 16, 1859.

Motion to vacate a judgment entered at general term, affirming a judgment of a district court. It appeared that the defendant appealed from a judgment rendered against him, and, after procuring the return of the justice to be filed, noticed the appeal for argument, and had it placed on the general term calendar for January last. The appeal not having been heard or disposed of at that term, it was continued on the calendar for the succeeding February term, when, on its being called by the court, no one appearing for the appellant, the judgment was affirmed on the application of the respondent. In entering this judgment, the only notice of argument filed was the notice served by the

appellant for the January term. The appellant moved to vacate the judgment upon the ground that his default had been irregularly taken, inasmuch as the appeal had not been noticed for argument by the respondent.

Philip Levy, for the motion.

John Townshend, opposed.

HILTON, J.—The appeal herein from the justice of the Sixth District Court was noticed for argument, on the part of the appellant, for January term, and was accordingly placed upon the calendar, there to continue *without further notice*, and until finally disposed of by the court. Code, § 364. The appellant failed to appear when the case was regularly called at the last general term, and the respondent asked for and obtained an affirmance of the judgment. There was no irregularity in his proceedings, and, as the appellant fails to show any excuse for his neglect, no reason exists for vacating the judgment thus entered.

An appeal from a justice's judgment differs from all other appeals, in not requiring to be noticed by either party *after* it has been regularly placed upon the calendar. By a special statutory provision, (Code, § 364), it remains upon the calendar until finally disposed of by the court, and unless the appellant appears when it is regularly called, the respondent is entitled to an affirmance of the judgment. This is the usual course, and was followed in the present case.

Motion denied, with costs.

JOHN PETTIGREW *v.* WILLIAM G. CHAVE AND JOHN R. BRIGGS.

Where a note is made for the accommodation of another, and given to him without restriction as to its use, it is no answer to an action against the maker upon it, by a person to whom it has been duly indorsed, that the note was so made, and the plaintiff received it with knowledge of that fact.

In such a case, a holder for value, before maturity of the note, is entitled to recover upon it, though he had full knowledge, at the time he received it, of the circumstances under which it was given.

To a complaint, in an action on a promissory note against the maker and payee, the maker answered that he made the note for the accommodation of the payee, and that fact was known to the plaintiff when he received it. *Held*, that the answer was frivolous.

As the answer did not allege any fraud in the transfer of the note to the plaintiff, nor that he did not give full value for it, it must be presumed that there was no fraud in the transaction, and that the plaintiff acquired the note for a valuable consideration.

AT SPECIAL TERM, *April* 21, 1859.

Motion for judgment against the defendant Chave, on account of the frivolousness of his answer. The action was upon a promissory note made by the defendant Chave to the order of the defendant Briggs, and subsequently indorsed to the plaintiff. The complaint was in the usual form, alleging the making of the note, its delivery to the payee, and his subsequent indorsement of it to the plaintiff for a valuable consideration before maturity. The answer of the defendant Chave merely set up that he made the note for the accommodation of the payee, and that the plaintiff knew, when he received it, that it was so made without consideration. The plaintiff moved for judgment, regarding the answer as frivolous.

Brown, Hall & Vanderpoel, for the motion.

Edward Person, opposed.

HILTON, J.—The defendant Chave sets up, as a defence, that the note sued on was made by him solely for the accommodation

of his co defendant, and that the want of consideration was known to the plaintiff when he received it. The plaintiff moves for judgment on account of the frivolousness of this answer, and he is clearly entitled to have his motion granted.

No fraud in the transfer of the note is alleged, nor is it averred that the plaintiff did not give a full and valuable consideration for it; and, as was said by Chief Justice MANSFIELD in *Charles* v. *Marsden*, (1 Taunt. 224), "it must, therefore, be presumed that he did, and that there is no fraud in the transaction."

Where a note is given under no restriction, but is made merely for the accommodation of the payee, and afterwards negotiated, it is no answer to an action brought upon it, to say that it was made for the accommodation of the payee, and that that fact was known to the plaintiff when he received it. In such a case, the holder for a valuable consideration is entitled to recover, though he had full knowledge of the transaction. *Smith* v. *Knox*, 3 Espinasse, 46. These rules are well settled, and no decision can be found asserting a contrary doctrine. *Grant* v. *Ellicott*, 7 Wendell 227; *Small* v. *Smith*, 1 Denio, 585; *Brown* v. *Mott*, 7 John. 361; Edwards on Bills and Notes, 318.

Motion granted, with $10 costs.

MARY MCNAMARA, BY HER NEXT FRIEND *v.* JOHN MCNAMARA.

A decree of separation from bed and board may be made, on the application of the husband, for the like causes as in cases of *feme coverts*.

It seems, the defence of adultery, as a ground for affirmative relief, cannot be interposed in an action for a divorce *a mensa et thoro*.

In an action by a wife for a limited divorce from her husband, upon the ground of cruel and inhuman treatment by him, a defence of general bad conduct and ill treatment by her was set up. At the trial she failed to establish her case, and the defence was fully proven. *Held*,—

I. That under the Code, a defendant may have such affirmative relief in an action, as the case shows him to be entitled to.

II. That cruel and inhuman treatment by the wife being established, the husband was entitled to a judgment of divorce *a mensa et thoro*.

At Special Term, *May* 17, 1859.

Motion for judgment, in an action for divorce *a mensa et thoro*, brought by the wife against the husband, upon the ground of cruel and inhuman treatment by him. The answer denied all these charges in the complaint, and set up, as a further defence, that the plaintiff had been guilty of adultery with divers persons; also, that her habitual bad conduct towards him rendered it improper for him to live with her; concluding with a demand for affirmative relief, and judgment that the marriage tie be dissolved.

The cause was referred, and the referee, on the proofs before him, reported that the plaintiff had failed to show any cause of action, but that the defence had been fully established. On this report, and the evidence attached, both parties appeared, asking for judgment,—the plaintiff claiming, in opposition to the report, that the evidence did not warrant the referee's conclusion, and the defendant asking under it a judgment of divorce in his favor.

John Brady, for the plaintiff.

Charles S. Spencer and *Addison Sanford*, for the defendant.

Hilton, J.—The complaint of the plaintiff alleges cruel and inhuman treatment on the part of the defendant, and concludes with a demand for judgment for limited divorce, or separation with alimony. The answer contains a denial of these charges, sets up as a defence the bad conduct of the plaintiff, and charges her generally with adultery with persons unknown, concluding with a demand of judgment that the marriage tie be dissolved. A reference appears to have been regularly made with directions to take proof of all the facts charged in the pleadings, with the usual direction to report the same to the court, with the opinion of the referee thereon, and no objection was taken to the defendant setting up adultery as a defence in the action, until evidence in support of it was offered before the referee, when the objection was overruled, and the testimony offered to sustain that defence was admitted.

It may be that the objection came too late. Had it been made in time, it is very probable the defence of adultery would be stricken out, upon the ground that it could not be interposed in an action like the present. *McIntosh* v. *McIntosh*, 12 How. Pr. R. 289. But it is unnecessary to express any opinion upon this question, now for the first time presented to the court, as I do not concur in the conclusion of the referee, that the evidence shows the plaintiff to have been guilty of adultery, and that the charges in the answer in this respect have been proven. Her conduct appears to have been loose, and of a character not at all to be commended, but I do not think any act of criminality has been shown, nor any circumstances sufficient to warrant the conclusion at which the referee has arrived. It does appear, however, and so the referee has reported, that instead of the defendant having ill treated the plaintiff, as she alleges in her complaint, she has been guilty of such conduct towards him as renders it unsafe and improper for him to cohabit with her; and the allegations in his answer, in this respect, have been fully sustained by the testimony.

It was decided by the late Chancellor WALWORTH, in *Perry* v. *Perry*, (2 Paige, 501), and I am not aware that the decision has ever been questioned, that the 12th section of the act of April 10th, 1824, (see Laws 1824, p. 249), which authorizes a decree of separation from bed and board, on the application of the husband, in the same cases and for the like causes as *feme coverts* were entitled to under the 10th and 11th sections of the act entitled "An act concerning divorces, and for other purposes," passed April 13, 1813, (see 2 Revised Laws, 200), was not repealed at the time of the adoption of our present Revised Statutes, but still remains in force. Therefore, as the evidence shows that the defendant is entitled to a judgment of divorce *a mensa et thoro*, no reason exists why it should not be granted to him in the present action. The statute referred to, it is true, authorizes such a decree, in terms, upon the application of the husband, by a bill of complaint filed by him; but the provisions of the Code (§2 74) are sufficiently comprehensive to cover all such

cases, and to permit the court to give such judgment in an action either for or against a plaintiff or defendant, as may be warranted by the evidence at the trial:—or, in the language of the section referred to, the court "may grant to the defendant any affirmative relief to which he may be entitled."

Judgment will accordingly be entered, decreeing a separation forever between the parties, upon the ground that the conduct of the plaintiff has been such towards her husband, the defendant, as to render it unsafe and improper for him to cohabit with her.

The Mechanics' and Traders' Fire Insurance Company *v.* Samuel W. Scott.

In an action upon a lease to recover rent, it is no defence that the lessee never had possession of the premises demised.

To render occupancy of the premises by another, an answer to a demand by the lessor, for rent of his lessee, it must appear that the occupation is under a title paramount to that of the lessor.

By leasing, the lessor does not warrant against the acts of strangers, or agree to put the lessee in actual possession.

The extent of his implied engagement is, that he has a good title, and can give a free and unincumbered lease for the term demised.

Where a lessee is kept out of possession by a party other than the lessor, or one holding under a paramount title, he must resort to his proper remedy to get possession under the lease.

At Special Term, *June* 23, 1859.

Demurrer to an answer. The complaint alleged that on March 6th, 1858, the plaintiffs let and leased to the defendant the house and premises No. 248 Hicks street, Brooklyn, for one year, to commence on May 1st, 1858, at the rent of $600, payable quarterly; and in consideration of such letting, the defendant covenanted and agreed with the plaintiffs to pay them the rent as aforesaid. That one quarter's rent became due August 1st, 1858, which, though demanded, the defendant refused to pay, and judgment therefor was asked, with interest.

The answer contained four separate defences, the last of which was in these words: "4th answer. The defendant further says, that at the time of the alleged agreement the said premises were in the possession and occupancy of the tenant of the plaintiffs, and have so continued, and are now occupied by the same tenant; and that the defendant has not, nor never had, possession of the said premises."

To this the plaintiffs demurred, on the ground that it did "not state facts sufficient to constitute a counter claim or a defence to the plaintiffs' complaint."

Walter M. Underhill, for the plaintiffs.

Samuel S. Rowland, for the defendant.

DALY, First Judge.—The fourth answer sets up no defence. The complaint avers that the plaintiffs leased the premises to the defendant on the sixth day of March, 1858, for one year, to commence on the 1st of May following. This vested in the defendant an interest in the term on the 1st of May, and rendered him liable, after that date, for the payment of the rent. *Whitney* v. *Allaire*, 1 Comst. 311. It is no answer that he has never had possession. *Bellasis* v. *Burbriche*, Lord Ray. 170; Holt, 199; *Eaton* v. *Jaques*, 1 Doug. 461. He avers that at the time of the agreement there was a tenant in possession, and that the same tenant is still in possession. This is no answer. It may be a tenant under a demise from some person having no claim or title to the premises. To render the occupancy of a tenant an answer to the demand for rent, the defendant must aver that the tenant is in possession under a title paramount to that of the plaintiff. *Ludwell* v. *Newman*, 6 T. R. 458. By leasing, the plaintiff does not warrant the defendant against the act of strangers, or agree to put him in actual possession. The extent of his implied engagement is that he has a good title, and can give a free and unincumbered lease for the term demised; and if the defendant is kept out of possession by the act

of any party other than the landlord, or one having or holding under another having a paramount title, he must resort to his proper remedy to get possession under his lease. *Gardner* v. *Ketcltas*, 5 Hill, 332; Platt on Covenants, 314. The demurrer is well taken.

Judgment for plaintiff.

GEORGE W. BENSON *v.* NICHOLAS E. PAINE AND EDWARD E. BARRETT.

Where one of two partners gives his individual note for their joint debt, a judgment upon the note operates as an extinguishment or merger of their joint liability.

A recovery of a judgment against one of several joint debtors is a bar to an action thereafter against all or any of the debtors upon their joint indebtedness.

The judgment puts an end to the joint liability of the party against whom it is recovered, and the plaintiff, by thus proceeding against one, abandons his right to treat the others as jointly liable.

It seems, where an action is brought against any number of joint debtors less than the whole, objection must be taken by plea in abatement, or it will be deemed waived, and judgment will be given as upon an obligation only of the party sued.

If the obligation be joint and several, the creditor has the election to sue the debtors jointly, or each of them separately, and a judgment without satisfaction against one will be no bar to an action against another.

The case of *Drake* v. *Mitchell* (3 East. 251,) examined and disapproved.*

AT SPECIAL TERM, *June* 23, 1859.

Demurrer to a complaint. The complaint alleged that the defendants were engaged in business as copartners, and while so engaged, the plaintiff, at the instance and request of Barrett, loaned to him for the use of the partnership, at divers times between February and November, 1854, various sums of money, amounting to $5,000 and upwards; which the defendants failed to pay, but remain indebted to the plaintiff therefor. That as security for

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* See *Olmstead* v. *Webster*, 4 Seld. 413; *Suydam* v. *Barber*, 18 N. Y. R. 463

the moneys so advanced, Barrett gave his five promissory notes to the plaintiff, payable in two, three, and four months, for different sums, in the whole amounting to $4,050. That Barrett failing to pay the notes, the plaintiff commenced an action against him upon them in the Superior Court of the city of New York, and recovered judgment therein on September 2d, 1856, for $4,085.51, on which execution was issued and subsequently returned unsatisfied. That the defendants, by reason of the premises and for the moneys so advanced, are indebted to the plaintiff in $4,050, with interest from November, 1854. Further, it was alleged that subsequent to the advancing of the money, Barrett, in addition to the notes, gave the plaintiff, as security, 400 shares of stock of the American Hosiery Company, a note of C. G. Judson for $450, and a paper purporting to be a mortgage on property in Philadelphia, which, before commencement of this suit, he offered to give to the defendants on their paying him the $4,050, with interest. That he has always been, and still is, ready to give up such securities to them, and brings them into court to be given up when he is paid the amount so due from them. Judgment was demanded for the amount so due, with interest.

The defendant Paine demurred, and specified the following grounds of objection to the complaint:

I. That there is a defect of parties, because Edward E. Barrett, named therein, is made a party defendant in this action.

II. The complaint does not contain facts sufficient to constitute a cause of action against defendant.

III. Because the debt set forth in the complaint became merged, extinguished, and barred in the judgment therein referred to, as well to the defendant Paine as to the defendant Barrett.

IV. Because the plaintiff elected to change the nature of his security from a partnership debt into a judgment against Barrett alone.

V. The taking of the notes and recovering a judgment thereon was a satisfaction of the original indebtedness.

Jasper W. Gilbert and Charles B. Cromwell, for the defendant Paine.

I. The defendant Barrett is an improper party, judgment having been recovered against him upon the identical indebtedness set forth in the complaint.

II. The judgment against Barrett is a bar. 1. The debt stated in the complaint is a separate one against Barrett. Story on Part., § 134, *et seq.* 2. Whether joint or separate, it is merged and barred in the judgment against Barrett. *Peters* v. *Sandford*, 1 Denio, 224; *Pierce* v. *Kearney*, 5 Hill, 86; *Moss* v. *McCullough*, id. 135; *Averill* v. *Loucks*, 6 Barb. 19; *Hawks* v. *Hinchcliff*, 17 Barb. 501. 3. The plaintiff, by electing to proceed against Barrett, has elected to change his security. Per BRONSON, J., in *Pierce* v. *Kearney*, *supra*; *Robertson* v. *Smith*, 18 J. R. 459; Coll. on Part. (Perkins ed.) § 757, and cases cited in note (3) and note (1).

III. Nor has the plaintiff any title to relief in equity. *Penny* v. *Martin*, 4 J. C. R. 568.

IV. The former recovery need not have been pleaded. It is averred in the complaint, and the questions are properly raised by demurrer. Code (Voorhies' ed.) § 145, and notes.

Francis Howland, for the plaintiff.

I. There is no defect of parties. *a.* The defect of parties (Code, § 144, sub. 4,) is a *non-joinder*, not a *misjoinder*. *Pinkerton* v. *Wallace*, 1 Abb. 82. *b.* The misjoinder of a party defendant is no ground of demurrer by his co-defendant, but by him only and on the ground that the complaint does not state facts sufficient, &c. *Brownson* v. *Gifford*, 8 How. 390; *N. Y. and N. H. RR. Co.* v. *Schuyler*, 17 N. Y. Rep. 592, 604. *c.* But Barrett is properly and necessarily a defendant. A demurrer would lie for his non-joinder. *Robertson* v. *Smith*, 18 Johns. 459, 481.

II. The recovery of an unsatisfied judgment against Barrett, on his individual notes, is neither bar, waiver, merger, satisfaction nor extinguishment of the claim and action against Paine

and Barrett for money lent the partnership. *a.* A judgment against one of two joint debtors, without satisfaction, is a bar to an action against the two upon the *same identical cause of action* only. *Ward* v. *Johnson*, 13 Mass. 148; *King* v. *Hoare*, 13 M. & Welsby, 494; *Robertson* v. *Smith*, 18 Johns. 459; *contra*, *Shelby* v. *Mandeville*, 6 Cranch, 253. *b.* So a judgment against one of two joint debtors upon an *individual* or *collateral* cause of action, which results in a *satisfaction*, by one, of the joint cause of action, is, by *extinguishing the debt*, a bar to a suit against the other, or against both; in like manner a judgment and satisfaction against one of two joint trespassers is a bar to a suit against the other. *Simonds* v. *Center*, 6 Mass. 18; *Livingston* v. *Bishop*, 1 Johns. 291; *Thomas* v. *Rumsey*, 6 Johns. 26; *Robertson* v. *Smith*, 18 Johns. 459, 473. *c.* But a judgment against one of two joint debtors upon a collateral or individual cause of action, though for the same moneys, is no bar, on the ground of merger or otherwise, to a subsequent action against the two upon the *joint cause* of action, unless it is accepted in satisfaction or actually satisfied. *Drake* v. *Mitchell*, 3 East, 251. Here Barrett is alleged to have been sued "on the notes" which were taken "as security." The two causes of action are different, and the evidence is different. *Rice* v. *Ring*, 7 Johns. 20; *Johnson* v. *Smith*, 8 Johns. 299.

III. The fourth ground of demurrer, that the plaintiff elected to change his security from a partnership debt to a judgment against Barrett alone, is in direct opposition to the allegation in the complaint, that it was "as security" only.

IV. The fifth ground of demurrer, that the judgment was a satisfaction, is in direct opposition to the allegation that it remains unsatisfied. See cases *supra*.

DALY, First Judge.—The plaintiff's case, as set out in his complaint, may be briefly stated. He loaned the defendants, Paine and Barrett, five thousand dollars, and, after the loan, took from the defendant Barrett his five promissory notes for $1,050, payable at different periods, as security for the loan. Barrett having

failed to pay the notes, the plaintiff brought an action upon them, and recovered judgment. He now sues Paine and Barrett, as jointly indebted to him in the sum of $4,050, the amount of the notes, and demands judgment against them for that amount, with interest. The defendants demur, and I think the demurrer is well taken.

It is well settled, that the recovery of a judgment against one of several joint debtors, though nothing is obtained upon it, is a bar to any future action thereafter, either against all the debtors or against any of them. *Robertson* v. *Smith*, 18 Johns. 459; *King* v. *Hoare*, 12 M. & Welsb. 494. It cannot be maintained against any number less than the whole; for, as the obligation is joint, an answer setting up the non-joinder of any one of the parties to the contract will abate the action. *Ascue* v. *Hollingsworth*, Croke Eliz. 494, 855; *Cabel* v. *Vaughan*, 1 Wms. Saund. 291. And it cannot be maintained against all, for a judgment having been previously recovered against one, he cannot, as long as it stands, be again charged in judgment for the same debt. *Higgins' Case*, 6 Coke R. 541; *Lilly* v. *Hodges*, 8 Mod. 541. If the action is brought against any number less than the whole, and no objection is taken by plea in abatement, the defendant will be deemed to have waived it, and the court will give judgment upon it as the obligation only of the party or parties sued. *Germon* v. *Frederick*, and *Dixon* v. *Bowman*, cited in note 4 to *Cabel* v. *Vaughan*, 1 Wms. Saund. 291; *Rees* v. *Abbott*, Comp. 832; *Lilly* v. *Hodges*, 1 Str. 533; 8 Mod. 166.

But if the contract or obligation be *several* as well as joint, as in a bond where the obligors bind themselves jointly and severally, the plaintiff has his election to sue all the parties jointly, or each of them separately. He may, in such a case, bring distinct actions against each of them; and a judgment without satisfaction against one, will be no bar to an action against another; but, though he may maintain distinct actions against each, he cannot unite two in one action, or any number short of the whole. He must either sue them all together, or each of them

separately. *Streatfield* v. *Halliday*, 3 T. R. 782; 10 Year Book, 27 H. VIII, 6 Pl. 26; note to *Cabel* v. *Vaughan*, *supra*.

This case is not strictly analogous to that of a joint and several obligation, in which all the parties to the contract bind themselves both severally and jointly, but a case in which one of two joint debtors gives, in addition, his individual obligation for the debt; and, in support of the plaintiff's right, after recovering a judgment upon the individual obligation, to maintain an action against both debtors for the debt due by them jointly, I am referred to *Drake* v. *Mitchell*, 3 East. 251. The case is certainly in point. One of three parties, who were jointly bound upon a covenant, gave his promissory note to the plaintiff in payment of his liability upon the covenant, and the note not being paid at maturity, the plaintiff recovered judgment against him. The plaintiff then sued all the parties to the covenant, and they plead the judgment against one of them in bar, but the plea was held bad. Lord ELLENBOROUGH declared, that he understood the principle, *transit in rem judicatum*, to apply only to the cause of action on which the judgment was rendered; thus distinguishing the note as constituting a distinct and different cause of action from that on the covenant; and GROSE, J., said that, not having been received in satisfaction, it could operate only as collateral security; that though judgment was recovered upon it, it had not produced satisfaction in fact, and that the plaintiff, therefore, might still resort to his original remedy upon the covenant. I do not consider the reasoning of the court in this case satisfactory, or think that it is reconcilable with the principle recognized and acted upon afterwards in the cases of *Robertson* v. *Smith* and *King* v. *Hoare*, before referred to. It is true, that in those cases the judgment was recovered against one joint debtor, in an action upon the original contract, but, as will appear from the authorities already cited, the effect of bringing the action against him solely, and of the absence of any plea of non-joinder, is treating it as his contract alone, and as such, judgment is given upon it. The principle upon which the cases of *Robertson* v. *Smith* and *King* v. *Hoare* rest is, that, after judg-

ment against one, another action cannot be brought upon the joint contract, as the effect of it would be to render two judgments against the same party for the same debt; and such was the result in *Drake* v. *Mitchell*, by giving judgment against all the parties to the covenant after judgment was rendered against one of them upon a note given for the debt due by the covenant. Such is the case here. The notes given by Barrett were for the debt for which he is now jointly sued with Paine, and if judgment is given for the plaintiff here, there will be two judgments against him for the same debt. It cannot be, as Lord ELLENBOROUGH and the other judges in *Drake* v. *Mitchell* supposed, that actual satisfaction is the test, and that because the plaintiff has taken an individual obligation from one of the joint debtors, he can have two judgments in his favor for the same debt—one upon the joint, and another upon the individual obligation. If satisfaction was the test, and could alone constitute a bar, it would be a complete answer to the objection of the previous recovery of a judgment against one, in an action against joint debtors, that it had not, in the language of the court in *Drake* v. *Mitchell*, produced the fruit of a judgment—actual satisfaction. But it was deemed no answer in *Robertson* v. *Smith*, which settled the law in this state, and the recovery of the judgment alone was held to be a bar, because it changed an indebtedness upon contract to a debt of record, and for the reason more fully given by Mr. Justice PARK, in *King* v. *Hoare*, that one of two joint contractors cannot be twice troubled for the same cause; that there could not be two separate judgments for the same debt; and that where judgment has been obtained for a debt, the right given by the record merges the inferior remedy by action for the same debt. Nor do I think that the distinction taken by Lord ELLENBOROUGH, that the covenant and the note constituted distinct causes of action, was a substantial one. The judgment upon the note was for the same debt, and to render another judgment against the same party upon the covenant, was contravening the principle referred to. The fact is, that the law upon this subject was not well understood, and

had not been very distinctly defined, when *Drake* v. *Mitchell* was decided. When the point came up for consideration in this state, in *Robertson* v. *Smith*, that a judgment against one joint debtor was an extinguishment of the right of action against the rest, there was a determination of the Supreme Court of the United States directly the other way, (*Sheehy* v. *Mandeville*, 6 Cranch, 253), and yet that decision, supported as it was by the weighty authority of Chief Justice MARSHALL, was, after full examination, deliberately disregarded; and when *King* v. *Hoare* was decided in England, so late as 1844, the *dicta* of numerous judges was cited against the proposition contended for, and the point was found to be so unsettled and doubtful upon the authorities, as to draw from Baron PARKE, in delivering the judgment of the court, the observation that it was remarkable that the question had never been actually decided in England. If the law, then, was so obscure or unsettled upon this point, it may serve to explain why the judges, in *Drake* v. *Mitchell*, thought, in the case before them, that nothing short of actual satisfaction would be a bar.

Separate judgments might be had against the maker and indorser of a promissory note, and against each of the parties to an instrument, where they had bound themselves severally as well as jointly; but though each judgment is for the same debt, it is against a separate person, and does not present what Chief Justice SPENCER, in *Robertson* v. *Smith*, declared would be an anomaly in the law, and inconsistent with the notion of a correct and regular judicial proceeding,—two judgments rendered against the same party for the same debt.

I have gone into this examination of the authorities—though there has been a recent decision in this state which is exactly in point (*Peters* v. *Sandford*, 1 Denio, 224,)—because the case of *Drake* v. *Mitchell* is relied upon here, and does not appear to have been considered, or to have been referred to in the decision of that case. One of two partners purchased a quantity of wool from the plaintiff, for which he gave his promisory note. The plaintiff indorsed the note and passed it away, and not being

paid at maturity, he and the maker were sued upon it, and judgment having been recovered, the plaintiff paid the judgment. He then sued both partners for the price of the wool, as purchased upon their joint account. But the court held, assuming that the defendants were partners, and were jointly liable in the purchase of the wool, that the judgment upon the promissory note given by one of them, worked an extinguishment or merger of their liability upon the joint contract. That to extinguish the joint contract it was not necessary that satisfaction should follow the judgment, for the judgment performed that office. This decision is in direct conflict with *Drake* v. *Mitchell*. It was a legitimate and logical deduction from the principle established by *Robertson* v. *Smith*, and is decisive of the point in question. I might have given judgment for the defendants upon the authority of this case alone, but as it is in conflict with *Drake* v. *Mitchell*, and as the law was assumed by the court without adverting to the opposite ruling in that case, I felt called upon to give the question a more full and extended examination.

Judgment for the defendant upon the demurrer.

The Mayor, Aldermen and Commonalty of the City of New York *v.* James Brett and John Pettigrew.

An action against the sureties upon the official bond of a constable of the city of New York, given pursuant to the requirements of § 147 of 2 Revised Laws of 1813, (p. 397), to recover for a wrongful act done by the constable in his official capacity; must be prosecuted in the name of the mayor, aldermen and commonalty of the city of New York.

The bond being given to the mayor, &c., of New York, for the benefit of any person aggrieved by the official misconduct of the constable, they are "trustees of an express trust" within the meaning of § 113 of the Code, and may sue without joining with them the person for whose benefit the suit is prosecuted.

In such an action it is not necessary for the plaintiff to show, at the trial, that leave of the court has been obtained to prosecute the bond.

If such leave has not been obtained, the omission can only be taken advantage of by the defendant, by a motion to the court to set aside the proceedings in the action.

Quere,—whether this motion can be made after a trial and verdict?

AT SPECIAL TERM, *June* 27, 1859.

Trial before a judge, by consent of parties, without a jury. The action was brought against the defendants as sureties upon a constable's bond, given to the mayor, aldermen and commonalty of the city of New York, pursuant to the provisions of section 147 of "An act to reduce several laws relating particularly to the city of New York," passed April 9, 1813. (See 2 Revised Laws, 397; also Davies' Laws relative to the city of New York, 518.) At the trial a judgment record was produced, showing a recovery against the constable for a wrongful act done by him in his official capacity; also that an execution issued thereon had been returned wholly unsatisfied. The plaintiffs then rested; whereupon the defendants' counsel moved to dismiss the complaint upon the ground that the action should have been brought in the name of the plaintiffs in the judgment, they being the real parties in interest, and also that because it did not appear that this court had granted leave to prosecute the bond in suit.

James Geddes Day, for the plaintiffs.

William C. Carpenter, for the defendants.

DALY, First Judge.—The only point arising in this case is, whether the action should have been brought in the name of the real parties in interest; and whatever doubts may have existed on that point heretofore, they are set at rest by the decision of the Court of Appeals in the *People* v. *Norton*, 5 Seld. 176. It was held in that case that an action upon a bond, given by a trustee and his surety to the people of this state, for the benefit of certain parties interested in the estate of which the defendant was trustee, was properly brought in the name of the people, and

there is nothing in principle to distinguish that case from the present.

If leave of the court to prosecute the bond had not been obtained before the commencement of the suit, the defendants' remedy was by motion to the court to set aside the proceedings. The plaintiffs were not bound to show upon the trial that they had obtained the leave of the court, and the want of proof of that fact constituted no ground for a non-suit. The plaintiffs are entitled to judgment.

Ordered accordingly.

Upon consultation, all the judges concurred in this opinion.*

JOHN J. TUCKER v. SAMUEL P. WILLIAMS.

If a contractor, in erecting a building, materially departs from what was agreed upon, and fails substantially to perform his contract, he can recover nothing, and practically forfeits to the owner all that has been done.

This rule, however, should only be applied to cases where the contractor utterly fails to show a substantial performance of his contract.

The evidence at the trial was conflicting as to whether the building had been erected in conformity with the contract. An architect, who had been employed by the owner to superintend the work as it progressed, was among those who testified that the work done was in compliance with the contract. *Held*, that in weighing the evidence, his testimony should be regarded as controlling upon the question.

AT SPECIAL TERM, *June* 27, 1859.

Trial before a judge without a jury, in an action to foreclose a mechanic's lien upon building and premises No. 18 East 37th street, belonging to the defendant. It appeared that the plaintiff had contracted with the defendant, as owner, to do the mason

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* See *The Mayor, &c., of N. Y.* v. *Doody*, 4 Abbott Pr. R. 127; *Davis* v. *Kruger*, 4 E. D. Smith, 350.

work on the building in question for $5,800, the work to be done to the defendant's satisfaction, and according to certain plans and specifications referred to in the contract. Some extra work had also been done, amounting to $65, and the building had been entirely finished, and was in the occupation of the defendant. A lien was claimed for $4,352, the balance alleged to be due over and above all payments made by the defendant on account. The defence set up in the answer was, that the building had been in no respect erected according to the plans and specifications; that there had been paid to the plaintiff, on account of his work, $4,683 in cash and notes, and the defendant, by reason of the failure and omission of the plaintiff to perform his contract, had sustained damages to the amount of $2,000, which he claimed to be allowed him against any demand of the plaintiff. At the trial the amount of the plaintiff's claim was not disputed, but it was insisted that the building had not been constructed according to the contract and specifications, and therefore no recovery could be had. It appeared also that, during the progress of the work, an architect in the employ of the defendant had overlooked and superintended it, and had given certificates upon which the payments had been made as the work progressed. He had also given a certificate, after the building had been completed, to the effect that it had been so finished according to the contract. Upon the question as to whether the work had been done in conformity with the contract, many witnesses were examined on both sides, and the views of the judge, respecting the weight to be attached to their testimony, are expressed in his opinion.

John R. Flanagan and Henry R. Cummings, for the plaintiff.

Samuel Williams, for the defendant.

DALY, First Judge.—This action is brought by the plaintiff to foreclose a lien for work and materials supplied in the erection of a building for the defendant. The building was erected under

a contract specifying the nature of the work and the kind of materials that were to be used. The plaintiff claims for what was done in pursuance of the contract, and for extra work—after allowing for all payments that have been made to him—a balance of $4,352. The defendant insists that the building was not erected in the manner required by the contract. That there was a material deviation, both as to the way in which the work was done and in the kind of materials that were used. That different parts of the work, and a considerable portion of the materials were greatly inferior to what was required by the specifications, and that the plaintiff, not having performed his contract, is entitled to nothing.

Though the building is finished and in possession of the owner, still if the contractor, in erecting it, has materially departed from what was agreed upon—if he has failed substantially to do what was specified and stipulated for in the contract—he can recover nothing, and practically forfeits to the owner what is done. *Smith* v. *Brady*, 17 N. Y. R. 173. This is a stringent, but healthy and necessary rule, to secure the faithful performance of contracts; but as the penalty it imposes upon the defaulting contractor is a severe one—in this case involving a loss of labor and materials valued at over four thousand dollars—the court, in applying the rule, should be well satisfied that the case is one coming clearly within it, and that the contractor has utterly failed to show a substantial performance of his contract.

The evidence in this case is conflicting. Three witnesses on the part of the defendant, who have examined the building since it was erected, and compared it with the specifications, swear that it is not built according to the specifications, and, in connection with two other witnesses, have pointed out parts which they regard as defective, and as failing to comply with what was required by the contract. While eight witnesses on the part of the plaintiff, including himself—who were either engaged upon the building or supplied materials towards its erection—rebut this testimony. I should have found it difficult to determine between these two classes of witnesses; but there is a feature in

the case which, upon a question so situated, has enabled me to reach what I regard as a satisfactory conclusion. The building was erected under the supervision of an architect, by whom the building was repeatedly examined while it was in progress, who gave directions as to the work, and upon whose certificates all the previous payments were made. For the two last and final payments he also gave his certificate, which was presented by the plaintiff to the defendant with the remark that the job was finished, to which the defendant answered that he was negotiating with his brother-in-law for the money, and that the plaintiff would be paid. There is no reason to suppose any collusion between the plaintiff and the architect, as the plaintiff had never employed him in anything, never agreed with him for any per centage, had never paid him anything, and had never come in contact with him until the erection of this building; and for his services as an architect in this matter he was paid by the defendant. The defendant sought to overcome this feature in the case by testifying that the architect was a very young man, whose experience had not been large; that he did not agree to pay upon his certificate, but only in the event that he was satisfied himself; upon which I asked him, what was the use, then, of employing an architect, and of requiring him to give a certificate; to which the defendant replied, that it was a mere form that was gone through with. To the defendant's testimony in this respect I gave no weight, but considered the final certificate of the architect, supported as it was by his testimony, as sufficient to turn the scale when testing the respective weight of conflicting testimony. I shall give judgment, therefore, for the plaintiff, for the amount claimed.

Judgment accordingly.

PETITION OF JOHN SNOOK FOR AUTHORITY TO CHANGE HIS NAME.

Under the "Act to authorize persons to change their names," (Laws 1847, ch. 464), before the judge is entitled to exercise the special jurisdiction thereby conferred, the evidence presented must be such that he can say judicially, that the applicant will derive a pecuniary benefit by assuming another name.

Mere belief of the petitioner that it will be for his pecuniary interest that his name should be changed, is not sufficient to authorize the judge to order the change desired.

The origin of proper names considered, and the law and usage respecting them examined.—Per DALY, F. J.

It seems, that although the custom is universal for all male persons to bear the name of their parents, there is nothing in the law prohibiting a man from taking another name, if he so desires; nor is there any penalty or punishment for so doing

A contract or obligation may be entered into by a person by any name he may choose to assume. The law only looks to the identity of the individual, and when that is clearly established, the act will be binding upon him.

AT CHAMBERS, *August* 4, 1859.

The applicant petitioned for a change of name under the provisions of the act referred to, passed December 14th, 1847. See 3 R. S. (5th ed.) 873. All the material facts in the petition are stated in the opinion.

The petitioner, in person.

DALY, First Judge.—This is an application for an order authorizing the petitioner to change his name to John Pike.

He sets forth in his petition that Snook is a name of German origin, corresponding with the English word Pike. That some years ago he intended to apply to the legislature for liberty to change his name, and consulted a lawyer, who advised him that he had the right to change his name himself, and that such application was not necessary. That he accordingly changed his name to John Pike, and became a member of a firm, in the city of Syracuse, under the name of John Pike & Co., and under that name became and is known to a large number of his business acquaintances, and enjoys under it a business goodwill;

that he contemplates entering into a copartnership with a gentleman of this city who objects to the name of Snook appearing in the business title or name of the firm, and that the petitioner believes it to be for his pecuniary interest that his name should be known as John Pike.

Under the act of 1847 a judge of this court may authorize any person of full age, residing in this state, to assume another name, if the judge is satisfied that the applicant will derive any pecuniary benefit from assuming another name. By this is to be understood that the judge is to be judicially satisfied, upon proper proof (*Smith* v. *Luce*, 13 Wend. 237,) that such will be the effect if the name is changed. To put a case in point, if an estate is left to a man by will, upon condition that he take the name of the testator, then it is apparent that he will derive a pecuniary benefit by being allowed to assume that name. In this case the petitioner merely shows that he believes that it will be for his pecuniary interest that his name should be changed to John Pike; but that, in my judgment, is not sufficient to give me authority, under this act, to order his name to be changed. The mere possibility or probability that such may be the effect is not enough. The evidence before the judge must be such that he can say judicially that the applicant will derive a pecuniary benefit by assuming another name, or a case is not presented that will entitle the officer to exercise the special jurisdiction conferred by the act.

The question has been asked, upon this application, whether he has not the right to translate his name into the English language, and call himself by the word in English, which is equivalent to or of the same meaning as Snook? It does not fall within the sphere of my judicial duty to pass upon that question; but, as this application has been made in good faith, and is very earnestly pressed, I have no objection to state my views. The word Snook is not, as the applicant supposes, of German origin, nor is "pike" expressed in German by such a word. The word is Dutch or Flemish, from *snoek*, signifying pike, a species of fish. Wernick's Dictionary. The meaning of the word con-

stituting the name of a person, is of no importance, for, considered as a name, it derives its whole significance from the fact that it is the mark or *indicia* by which he is known. Many names have no specific meaning apart from indicating the persons who bear them, and, as *designatio personæ*, it makes no difference should the word or name performing that office, as is frequently the case, be also a word for expressing something else. As the proper or lawful names of persons is a subject to which legal writers have paid but little attention, it will be necessary to examine the state of the law respecting it. As I have said, a man's name is the mark or *indicia* by which he is distinguished from other men. By a practice now almost universal among civilized nations, it is composed of his christian or given name, and his surname. The one is the name given to him after birth, or at baptism; the other is the patronymic derived from the common name of his parents. In the case of illegitimates, they take the name or designation they have gained by reputation. *Rex* v. *Smith*, 6 C. & P. 154; *Rex* v. *Clark*, R. & R. C. C. 358. The christian or first name is, in the law, denominated the *proper* name; and a party can have but one, for middle or added names are not regarded. *State* v. *Martin*, 10 Mis. 391; *Edmonston* v. *The State*, 17 Ala. 179; *McKay* v. *Spick*, 8 Texas, 376; *Rex* v. *Newman*, 1 Ld. Ray. 562, 305; *Franklin* v. *Tallmadge*, 5 Johns. R. 64. Formerly, the christian name was the more important of the two. "Special heed," says Coke, "is to be taken of the name of baptism, as a man cannot have two, though he may have divers surnames." Coke Litt. 3, *a* (*m*). Indeed, anciently in England, there was but one name, for surnames did not come into use until the middle of the fourteenth century, and even down to the time of Elizabeth, they were not considered of controlling importance. Thus Chief Justice POPHAM, in *Britton* v. *Wrightman*, (Poph. 56), speaking of grants, declares that "the law is not precise in the case of surnames, but for the christian name," he says, "this ought always to be perfect;" and throughout the early reports the christian name is uniformly referred to as the most certain mark of the identity of the individual in all deeds

or instruments. Greater importance being attached to the christian name arose from the fact that it was the designation conferred by the religious rite of baptism, while the surname was frequently a chance appellation, assumed by the individual himself, or given to him by others, for some marked characteristic, such as his mental, moral or bodily qualities, some peculiarity or defect, or for some act he had done which attached to his descendants, while sometimes it did not. Camden mentions an instance of a knight in Cheshire, each of whose sons took different surnames, whilst their sons, in turn, also took different names from their fathers. They altered their names, he says, in respect to habitation, to Egerton, Cotgrove, and Overton; in respect to color, to Gough, which is red; in respect to learning, to Ken-Clarke, (a knowing clerk or learned man); in respect to quality, to Goodman; in respect to stature, to Richard Little; and in respect to the christian name of the father of one of them, to Richard son, though all were descended from William Belward; and the gentlemen of Cheshire, he adds, bearing those different family names, would not easily believe that they were all the descendants of one man, were it not for an ancient roll, which Camden saw. Camden's Remains, (ed. of 1637), p. 141. And Lord Coke refers to the Year Books to show that a man may have divers names, that is, surnames, at divers times. Coke Litt. 3, *a*. The insufficiency of the christian name to distinguish the particular individual, where there were many bearing the same name, led necessarily to the giving of surnames; and a man was distinguished, in addition to his christian name, in the great majority of cases, by the name of his estate, or the place where he was born, or where he dwelt, or from whence he had come, as in the name Washington, originally Wessyngton, which, as its component parts indicate, means a person dwelling on the meadow land, where a creek runs in from the sea, or else from his calling, as John the smith, or William the tailor, in time abridged to John Smith and William Taylor. And as the son usually followed the pursuit of the father, the occupation became the family surname, or the son was distinguished from the

father by calling him John's-son, or William's-son, which, among the Welsh, was abridged to *s*, as Edwards, Johns or Jones, or Peters, which, as familiar appellations, passed into surnames. The Normans added Fitz to the father's christian name, to distinguish the son, as Fitz-herbert or Fitz-gerald. And among the Celtic inhabitants of Ireland and Scotland, where each separate clan or tribe bore a surname, to denote from what stock each family was descended, Mac was added to distinguish the son, and O to distinguish the grandson; and generally, where names were taken from a place, the relation of the individual to that place was indicated by a word put before the name, like the Dutch *Van* or French *De*, or a termination added at the end, which additions were in time merged into and formed but one word, until, from these various prefixes and suffixes, numerous names were formed and became permanent. So, as suggested, something in the appearance, character, or history of the individual gave rise to the surname, such as his color, as black John, brown John, white John, afterwards transposed to John Brown, &c.; or it arose from his bulk, heighth, or strength, as Little, Long, Hardy, or Strong; or his mental or moral attributes, as Good, Wiley, Gay, Moody, or Wise; or his qualities were poetically personified by applying to him the name of some animal, plant, or bird, as Fox or Wolf, Rose or Thorn, Martin or Swan; and it was in this way that the bulk of our surnames, that are not of foreign extraction, originated and became permanent. They grew into general use, without any law commanding their adoption, or prescribing any course or mode respecting them; for I know of but one instance of a positive statute commanding the taking of names or regulating the manner of selecting them, and that was limited to a particular locality. In the fourth year of the reign of Edward IV. an act was passed compelling every Irishman that dwelt within the English pale, to take an English surname, and enacting that it should be the name of some town, or of some color, as black or brown, or of some art or occupation, or of some office, which led to an extensive change of names in that part of Ireland, as a non-compliance was attended with a

forfeiture of goods. But, though for several centuries the practice of giving or assuming surnames was general, it extended little farther than the particular individual of which it was the designation or mark. His descendants adopted it or not, at pleasure, or he assumed a new name himself, or others conferred upon him some characteristic appellation, which adhered to him and his descendants. This fluctuation and change, however, was materially arrested by a statute, passed 1 Henry V., c. 8, called the Statute of Additions, which required not only the name of the individual to be inserted in every writ or indictment, but, in addition, his calling, his estate or degree, and the town, hamlet, or place to which he belonged. And in the reign of Henry VIII., Cromwell, the secretary of the king, established a regulation, by which a record was required to be kept in every parish of births, marriages and deaths; a regulation which, in connection with the previous act, operated to check the caprice of individuals in the matter of their names, and to fix them as durable appellations, for every man's name thereafter became a matter of record at his birth, his marriage, and at his death; and this recording of such events in every family, led to the use of one name to designate the members of one family, which the record served to perpetuate; transmitting it from father to son, until the practice became general for all descendants to bear, and become known by, the name of a common ancestor. But this was the work of several centuries, and even at the present day, in remote and sparsely settled districts of England and Wales, the practice is not entirely extinct of assuming and changing surnames. All this, it will be seen, was brought about without any positive provision of law, other than those that have been referred to. By a usage, sufficiently general to be called universal, the son now bears the name of the father, and in turn transmits it to his own male descendants. Surnames, from their infinite variety, have now become a more certain mark of identity than the first name, for the whole number of christian or first names now commonly in use do no not exceed six hundred, while the directory of this city exhibits no less than twenty thousand varieties of surnames.

place where he is unknown; for as long as he continues to abide where he is known, people will continue to call him him by the name to which they are accustomed.

It is this difficulty, I apprehend, mainly, that led to the practice of applying for the king's license, or the passage of a statute, in cases where the taking of a new name had become necessary in consequence of the devise of an estate upon that condition, as all persons will conform to what is decreed or enjoined by the sovereign authority of the state. Lord MANSFIELD seems to have thought, in *Gulliver* v. *Ashby*, (4 Bur. 1940), that the king's license, or an act of parliament, was essential to entitle a man to assume another name; but in later cases the right of an individual to take another name, without the king's license or an act of parliament, has been distinctly recognized; and the validity of acts done in the adopted name have been sustained even where they imposed a charge upon the public. In *The King* v. *The Inhabitants of Billinghurst*, (3 Maule & Sel. 250), the question was, whether a pauper, whose baptismal and surname was Abraham Langley, and who, by that name, had a legal settlement in Billinghurst, could, with his wife and family, be charged upon that parish. He was married in another parish by the name of George Smith, and had been known in that parish for three years before his marriage by that name. The wife and children had no settlement in Billinghurst, unless they had acquired one by the marriage, and the point involved was the validity of the pauper's marriage by the name of George Smith; the marriage act of 26 Geo. II, c. 33, rendering it essential to the validity of a marriage that there should be a publication beforehand of the "*true* christian and surnames" of the parties. It was insisted that this had not been done—that the marriage was, therefore, void, and that the wife and children were not chargeable upon the parish of Billinghurst; but the court held that the publication of the banns by the name of George Smith—that being the name which the pauper had gained by reputation, and by which he was known at the time in the parish where he was married—was a publication of the true name within the meaning

of the act. In a note at the end of this case, several decisions of Lord STOWELL, in the Consistory Court, are collected. In one of them (*Frankland* v. *Nicholson*) Ann Nicholson was married and the banns published by the name of Ann *Ross*. Sir WILLIAM SCOTT, in reply to the argument that the proper christian and surname of a party could not be altered except by the king's license or an act of the legislature, said, that there might be cases where names, acquired by general use and habit, would be taken as the true christian and surname of a party, but as there was not sufficient evidence in the case before him to show that the woman had ever been known by the name of Ross, he annulled the marriage. In another case before him, (*Mayhew* v. *Mayhew*), which was a proceeding for a divorce upon the ground of adultery, the woman set up that she had never been legally married, having been described in the publication of the banns as Sarah Kelso, when her real name was Sarah White. It was shown, in reply, that she had gone by several different names, but was generally known by the name of Kelso before the marriage, and upon this evidence he held the marriage to be valid.

Doe v. *Yates* (5 Barn. & Ald. 544,) is a case still more distinctly in point. An estate was devised upon condition that the devisee should take the surname of the testator. The will provided that, within three years after the devisee arrived at the age of twenty-one, he should procure his name to be altered to the testator's name of Luscombe, by act of parliament or in some other effectual way. The devisee, before he was of age and before he entered upon or was let into the possession of the estate, took the name of Luscombe, which name he continued thereafter to bear. At twenty-one he took possession of the estate, but suffered the three years to go by, without applying for the king's license or an act of parliament, to entitle him to use the name of Luscombe, and he continued to hold and enjoy the estate for eight years thereafter, when he conveyed it to the defendants. It was insisted that he had forfeited the estate by having failed to comply with the testator's directions within the three years after he reached twenty-one, in not obtaining or applying for the king's license, or

an act of parliament authorizing him to take the name of Luscombe. But the court gave judgment for the defendants, holding that the devisee had sufficiently taken the testator's name, and that it was not necessary for him to apply for an act of parliament or for the king's license. "A name," said Chief Justice ABBOTT, in delivering the judgment of the court, "assumed by the voluntary act of a young man at his outset into life, adopted by all who knew him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually *his* name as if he had obtained an act of parliament to confer it upon him;" and there are numerous cases, both in this country and in England, holding that where a man enters into a contract or does any act in a particular name, that he may be sued by the name that he used, whatever his true name may be, and generally that wherever a man has done an act in a particular name, or where he makes a grant, that it may always be shown in support of the validity of the act, that he was known by that name at and about the time when the act was done, though he may have been baptized or previously known by a different name. All that the law looks to is the identity of the individual, and when that is clearly established the act will be binding upon him and upon others. *Waterbury* v. *Mather*, 16 Wend. 611; *Griswold* v. *Sedgwick*, 6 Cow. 456; *Jones' Estate*, 27 Penn. 336; *Prettyman* v. *Wales*, 4 Harring. 299; *Toole* v. *Peterson*, 9 Ired. 180; *Selman* v. *Shackelforde*, 17 Geo. 615; *Williams* v. *Bryant*, 5 Mees. & Wels. 447; *Finch* v. *Cocken*, 5 Tyrw. 774; *Attorney-General* v. *Hawkes*, 1 Cro. & Jer. 120; *The Queen* v. *Avery*, 18 A. & Ellis (N. S.) 576; Comyn's Digest, Fait. E. 3.

I have gone into the examination of this question so minutely because it has never, so far as I am aware of, been previously investigated; and into the origin of the usage that now prevails in respect to names, because the works commonly referred to on matters of general knowledge are exceedingly barren of information upon the subject of personal nomenclature. The result of this examination shows, I think, there is nothing in the law to prevent the petitioner from continuing to call himself John

Pike. If, as stated in the petition, he adopted it some years ago, engaged in business by that name, and is known among his business acquaintances and customers by that designation, there is no reason why he should not continue to use it. Any contract or obligation he may enter into, or which others may enter into with him by that name, or any grant or devise he may hereafter make by it, would be valid and binding; for, as an acquired and known designation, it has become as effectually his name as the one which he previously bore. I have no hesitation, therefore, in saying that I think he may lawfully use it hereafter, in all transactions, as his name or designation.

Application refused.*

* By an act of the legislature passed March 17, 1860, (see Laws, p. 125), the power of the court was very materially enlarged in respect to permitting a person to assume another name; by amending § 3 of the act of 1847 (see Laws 1847, ch. 464) so as to read as follows:

"If the court to whom such application shall be made, shall be satisfied by such petition, so verified, or by affidavits presented, that there is no reasonable objection that such person should assume another name, such court shall make an order authorizing such applicant to assume such other name from and after some time, not less than thirty days, to be specified in such order. It shall be the duty of the county clerks of the several counties of this state, except the city and county of New York, and of the clerk of the Court of Common Pleas for the city and county of New York, annually, in the month of December, to make a return to the office of the secretary of state, of all changes of names of persons made under and by virtue of this act; and the names of such persons before and after such changes, as the same shall appear in such returns, shall be published in tabular form with the session laws of each year."

WILLIAM B. TELFER, CLAIMANT, *v.* HENRY KIERSTEAD AND AMELIA KIERSTEAD, OWNERS.

The primary object of the Mechanics' Lien Law is to create, in favor of the sub-contractor, laborer, and material man, a lien upon the fund in the hands of the owner, due or owing to the contractor, and as to that fund to create a lien having priority over every general creditor of the contractor.

The death of the contractor after the completion of the work, does not deprive a sub-contractor, laborer, or material man, of the right to thereafter file a notice of claim, and acquire a lien for labor or materials furnished on the employment or request of the contractor.

The only condition imposed by the law upon the right to a lien under it, is, that the notice of claim therein prescribed shall be filed and served within six months after the work has been performed or the materials furnished.

AT SPECIAL TERM, *December* 14, 1859.

Demurrer to a complaint. The action was brought to foreclose a mechanic's lien acquired by the plaintiff upon premises in Fifty-fourth street, in this city. The complaint alleged, among other necessary averments, that William Dennison entered into a contract with the defendants, by which he was to erect for them a building upon the premises in question; that, under an employment by Dennison, the plaintiff did the plastering work, for which it was agreed he was to receive $400. That Dennison completed the building, and after such completion, but before the plaintiff filed his notice claiming a lien, Dennison died intestate, and his wife has since administered upon his effects. Judgment was demanded for the amount claimed.

The defendants demurred upon the ground that the complaint did not show facts sufficient to constitute a cause of action.

The only question presented, was whether the death of the original contractor deprived the plaintiff of his right thereafter to acquire a lien, under the Mechanics' Lien Law, for the materials and labor furnished by him towards the erection of the building.

Henry D. Van Orden, for the defendants.

D. & T. McMahon, for the plaintiff.

BRADY, J.—William Dennison agreed with the defendants, the owners of the premises described in the complaint, to erect a building thereon, and the plaintiff contracted with Dennison to do certain work and furnish certain materials towards such erection, and in conformity with the contract between defendants and Dennison. The plaintiff performed his agreement, and Dennison completed his contract, but died intestate before the plaintiff's lien was filed. The plaintiff's labor was performed, and the materials furnished, however, within six months prior to the filing of the lien. The defendants demur and insist that the Lien Law is a special statute, to be strictly construed; that it contemplates the existence of the contracting parties, and that the death of the contractor in effect repeals or abrogates the statute, and deprives the laborer or material man of his lien. That upon the death of the contractor his assets pass to the executor or administrator, and that the intervention of the lien cannot deprive his legal representatives of their power over his estate. The answer to this argument is, that the primary object of the legislature was to create, in favor of the laborer and material man, a lien upon the fund in the owners' hands, due to the contractor, and as to that fund to give him priority over every general creditor of the contractor, imposing only, as a condition, that within the time prescribed therefor he should file and serve the notice required by the statute. That condition has been performed, and the plaintiff's right thereupon became absolute. The contractor having finished the building, there was a balance due to him, which was subject to the plaintiff's inchoate right, and that right could be defeated only by the payment to the contractor of the balance, prior to notice of the lien. For these reasons I think the demurrer not well interposed, and that the plaintiff is entitled to judgment.

Ordered accordingly.

JACOB S. BROWN AND ANOTHER, CLAIMANTS, *v.* REUBEN R. WOOD, CONTRACTOR, AND OWEN O'CONNOR, OWNER.

In a proceeding to enforce a mechanic's lien, the service of the notice to appear and submit to an accounting, is in effect the commencement of a suit, and whether the owner appears or not on the day specified, the proceedings thereafter are as in an action.

The service of a defective bill of particulars constitutes no ground for dismissing the proceeding.

If the bill served is not sufficiently specific, the defendant may, before answering, require a further and more particular bill, under § 158 of the Code.

AT SPECIAL TERM, *December* 28, 1859.

Proceedings to foreclose a mechanic's lien. The claimant served upon the owner a notice in proper form, requiring him to appear in this court on this day, and submit to an accounting and settlement of the amount claimed to be due to the contractor. Attached to the notice was a bill of particulars of work and materials furnished towards the erection of a building owned by the defendant, "situate in the fourth ward, in the city of New York, on the west side of New Bowery, between James and Roosevelt streets." The bill was in the form following:

"Mr. Reuben R. Wood, contractor, and
Owen O'Connor, owner,
To
Brown & Macomber, *Dr.*
1859. To work done and performed, and materials
furnished in flagging, &c. - - - $92."

On the day specified in the notice, counsel for the respective parties appeared, and on behalf of the defendants it was asked that the proceedings be dismissed, upon the ground that the bill of particulars was indefinite and insufficient, and not in accordance with the provisions and requirements of the Mechanics' Lien Law.

John H. McCunn, for the claimant.

Charles W. Kline, for the owner and contractor.

DALY, First Judge.—The service of the notice is in effect the commencement of a suit; for whether the owner appears or not upon the day named in the notice, the proceedings are conducted thereafter, and judgment entered up, as in an action. *Reynolds* v. *Hamil*, 1 Code R. (N. S.) 231; *Smith* v. *Manice*, id. 230. The bill of particulars may be served at any time within fifteen days after service of the notice. The statute does not declare what it shall contain, further than that it is to be a bill of particulars of the amount claimed. The bill served in this case, taken in connection with the notice, is specific as to the amount claimed, and that it is claimed for flagging and furnishing the blue stone used *in* and *about* the building described in the notice as the one upon which a lien has been effected. If the bill is not as specific or particular as would be required in an ordinary action, that is no ground for setting aside the proceeding, as, after the complaint is served, the defendants, before answering, may, under section 158 of the Code, require the plaintiff to furnish a further and more particular bill.

Motion denied.

ESTHER LEOPOLD, BY HER NEXT FRIEND HEYMAN LEOPOLD *v.* MORRIS MYERS.

The court will order the expenses of a guardian *ad litem*, or next friend, of an infant plaintiff, paid or incurred in prosecuting an action, to be reimbursed to him out of the amount recovered.

But this power will not be exercised after the moneys have been paid over to the infant or his general guardian.

It seems that the appointment, as guardian *ad litem* or next friend for an infant plaintiff, cannot be forced upon a person against his consent.

The object of the appointment is, that there may be a responsible person before the court, accountable for the costs of the defendant in the action.

He is not regarded as a party to the suit, his duty being merely to prosecute for the infant's rights; but he cannot be compelled to incur any expense in the prosecution.

He cannot compromise or settle the suit, nor is payment to him a legal satisfaction of the claim; and his duty ends when the case has been prosecuted to final judgment.

AT SPECIAL TERM, *January* 11, 1860.

Motion by the next friend of the infant plaintiff to compel the attorney, who was employed to prosecute the action, to pay the amount expended and incurred by the next friend in such prosecution. The action was brought to recover damages for a breach of promise of marriage. It appeared that the attorney who brought the action had been employed by the next friend for the purpose; that during its progress the next friend had paid and incurred considerable expense in respect to it, and $2,500 had been recovered. The money had been paid into the hands of the attorney, and he had paid it over to the general guardian of the infant, with knowledge that the next friend had not been reimbursed the moneys he had so expended.

C. Bainbridge Smith, for the motion.

Samuel Williams, opposed.

HILTON, J.—A *prochein ami*, or *guardian ad litem*, for an infant party to an action, is a species of attorney, whose duty it is to prosecute for the infant's rights, and to bring those rights directly under the notice of the court, (*Knickerbocker* v. *De Freest*, 2 Paige, 304); but he can do nothing to the injury of the infant, and therefore cannot compromise or settle his suit, (*Miles* v. *Kaigler*, 10 Yerger's Tenn. R. 10), and a payment to him is not a legal satisfaction, unless ratified by the infant on obtaining his majority. *Allen* v. *Roundtree*, 1 Speer's (S. C.) R., 80. He is not regarded, for any purpose, as a party to the suit, and his duty

ends when it is prosecuted to final judgment; (*Brown* v. *Hill*, 16 Verm. 673; *Isaacs* v. *Boyd*, 5 Porter's Ala. R. 388); and in *The People* v. *N. Y. Com. Pleas*, (11 Wend. 166), it was held that the only reason for his appointment was, that there might be a responsible person accountable for the costs of the action.

In early times the custom was to appoint officers of the court, but, as was said by Ch. J. WILLES in *Slaughter* v. *Talbott*, (Willes' R. 190), the practice was altered, for the reason that the court would not subject its officers to this liability for costs; and in awarding the attachment there ordered against the next friend for the costs of the suit, it was remarked by Mr. J. Fortesque Aland, that "the *prochein amis* may have satisfaction over against the infants, and generally they take security."

The same liability still exists, and it is enforced in the same manner. (Code, §§ 115, 316.)

The appointment as guardian, or next friend, for an infant plaintiff, cannot be forced upon any person against his consent, nor can he, after his appointment, be compelled to incur, in the prosecution of the suit, any liability other than for the costs of the adversary, if the infant fails in his action, and for which he has his remedy against the infant's estate by a proper proceeding; and he is not permitted to receive any property of the infant until he has given sufficient security, approved by a judge of the court, to account for and apply the same under the direction of the court, (Code, § 420), except such costs and expenses as may be allowed to him by the court out of the moneys recovered by the infant in the suit. (Rule 62.)

It appears, in this case, that the infant plaintiff recovered a judgment in her favor for over $3,000, and married during the pendency of the action. At its commencement, the defendant was arrested, and, in lieu of bail, deposited with the clerk of the court $2,500, which, after the judgment, was, by the order of the court, paid over to her attorney. While it was in his hands, she and her husband—who, it appears, had been appointed general guardian of her person and estate by the surrogate—joined in a notice to the attorney, forbidding payment of the money to any per

son other than such husband and guardian; and the money was subsequently paid, and the attorney discharged from all claim in respect to it, by a receipt in full, signed by the guardian and the infant plaintiff.

Subsequent to this payment being made, the next friend of the plaintiff in this suit, notified the attorney not to pay over the money, as he had a claim upon it for the expenses and disbursements made by him as guardian, or next friend, in the action; and I am asked to enforce this claim, by an order directing its payment by the attorney, and, in case of refusal, to compel obedience by attachment.

If it was admitted that any part of the money recovered remained in the hands of the attorney, there can be no doubt of the power, under the rule to which I have referred, and upon general principles applicable to such cases, to allow the guardian out of the fund a sum sufficient to reimburse him for his costs and expenses in the action, when the amount expended should be ascertained; and, in such a case, after the allowance should be made, and the attorney had notice of it, any payment thereafter by him to the prejudice of the guardian, would probably be at the attorney's risk and peril; but I can perceive no propriety in making the order here asked for, after the fund has passed from the custody and control of the court, and has been paid by the attorney to the only person appearing authorized to receive the same, prior to any allowance of the kind referred to being made by the court, and before the attorney had notice of the guardian's intention to lay claim to any part of the fund.

As I before remarked, the guardian here was under no obligation to make advances for the purposes of the suit, and, as he volunteered to make them, he should have seen to having his application for reimbursement made while the fund remained in the custody of the court. Had he applied in time, a proper allowance would have been granted to cover his expenses; but he has seen fit to wait until the money has passed from under our control, and we can afford him no relief in the way he suggests, but must leave him to such remedy as he may have by an ordinary

action, or by a proceeding against the moneys in the hands of the husband and guardian.

Motion denied.

LOUIS H. PIGNOLET *v.* JULES DAVEAU.

A summons is irregular which, at the time of service, is unaccompanied by a complaint, and does not state where the complaint is or will be filed.

When a defendant has appeared in the action, a notice of discontinuance is inoperative, unless accompanied by payment of costs.

AT SPECIAL TERM, *March* 26, 1860.

Motion to set aside a summons. It appeared that the summons served upon the defendant was in the ordinary form for a money demand on contract, and required the defendant "to answer the complaint in this action, a copy of which is herewith served upon you," &c., or if he failed to answer, the plaintiff would take judgment for an amount specified, with interest. No complaint having been served with the summons, the defendant's attorney addressed to the plaintiff the following notice or letter:

N. Y. COMMON PLEAS.—*Pignolet* v. *Daveau.*

New York, Oct. 18, 1859.

Sir—The summons, as served upon defendant in above cause, is irregular. I presume you intended to serve a summons in accordance with section 180 of the Code, as you served no complaint at the time you served the summons. I do not desire, however, to take advantage of your error, but, as the defendant's attorney, will accept service of a complaint now. You must, however, serve a copy complaint forthwith on me, at my office, 167 Broadway, N. Y. Yours, &c.,

HENRY H. MORANGE, *Deft's Att'y.*

To LOUIS H. PIGNOLET, Esq., *Plff. in person.*

On the 20th October the plaintiff sent to Mr. Morange and re-

quested him to sign a written demand that a copy of the complaint should be served upon him, as the attorney of the defendant, and also a formal notice of retainer and appearance, saying, if he would do so, that a copy of the complaint then produced would be served upon him. On this being refused, he was told that the plaintiff did not consider the letter of the 18th a sufficient retainer or appearance, and thereupon he was served with the following notice:

Sir—You will please disregard the summons served on Jules Daveau, on the 13th of October, at my suit, and return the said summons to me. LOUIS H. PIGNOLET.

Dated October 20, 1859.

The defendant, under these circumstances, moved to set aside the summons for irregularity.

Henry H. Morange, for the motion.

William F. Howe, opposed.

DALY, First Judge.—The summons was irregular. It was not accompanied by the service of a copy of the complaint, and did not state that the complaint was, or when it would be, filed. The letter of Morange was a notice of appearance. *Baxter* v. *Arnold*, 9 How. 445; *Quick* v. *Merrill*, 3 Cai. 133. It was signed by him as the defendant's attorney, and informed the plaintiff's attorney that he, Morange, would waive the irregularity in the summons, and accept, as the defendant's attorney, the service of a copy of the complaint. The proper course for the plaintiff's attorney, then, was to serve a copy of the complaint upon Morange, and upon such service being made, the defendant would have been precluded from taking any advantage of the defect in the summons. This the plaintiff's attorney did not do, but offered to serve a copy of the complaint upon Morange if he would sign a formal notice of retainer by and appearance for the

defendant, together with a written demand that a copy of the complaint should be served upon him, as the defendant's attorney. This Morange refused to do; and certainly this one formality was unnecessary, as Morange had already given notice of appearance, and demanded, in writing, a copy of the complaint. Upon this refusal the plaintiff's attorney served a notice upon Morange, requiring him to disregard the summons served upon the defendant. This was, in effect, a notice of the discontinuance of the suit, which was inoperative without the payment of costs, as the defendant had appeared by attorney. *McKenster* v. *Van Zandt*, 1 Wend. 13. The defendant's attorney now moves to set the summons aside for the irregularity.

Motion granted, with costs.

JAMES G. MARTIN *v.* GEORGE SHERIDAN.

The personal earnings of a debtor are exempted by law from being applied in payment of a judgment against him, when it is made to appear that they are necessary for the use of a family supported wholly or partly by his labor.

On supplementary proceedings it was shown that there was money due to the defendant for his personal services within sixty days previous; that his wife supported his family by keeping a boarding house, and although he testified that his family was dependent upon him, yet it did not appear that he contributed in any way to its support. *Held*, that his earnings were not exempt.

AT CHAMBERS, *March* 27, 1860.

On proceedings supplementary to execution against the defendant, it appeared from his examination that he was a cartman, and that the corporation of the city of New York was indebted to him for his personal services, as cartman, within the previous sixty days, an amount more than sufficient to pay the judgment. It was also disclosed that he had a family consisting of a wife and an adopted daughter, both engaged in supporting themselves by keeping a boarding house, and it did not appear that he con-

tributed to their support in any way, although in his affidavit used on the application he stated that his family were dependent upon him. The plaintiff claimed that the amount due to the defendant for his services were not, under the circumstances, exempt from being applied in payment of the debt, and asked for an order directing its application in extinguishment of the judgment.

Aubry C. Wilson, for the motion.

J. Lewis Peters, opposed.

HILTON, J.—It appears that the defendant has a wife and an adopted daughter, who are engaged in keeping a boarding house; and he is a cartman, using his horse and cart in the employ of the corporation. From such employment there is now due him for his earnings, within the last sixty days, a sum sufficient to pay this judgment, but which he insists cannot be applied to its payment because "he has a family depending upon him for support." His examination discloses the fact that his wife supports the house, pays all the bills necessary for it, and that he has nothing to do with it; and it is not shown that he contributes in any way to the support of his house or family.

Section 297 of the Code exempts the personal earnings of the debtor from being applied to the payment of his judgment debts, "when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family *supported wholly or partly by his labor*;" and as the defendant here only shows that he has a family depending upon him, without showing that he supports them "wholly or in part by his labor," I think he has not made out a case for exemption within the provisions of the section of the Code referred to.

Motion granted.

THE BOARD OF COMMISSIONERS OF EXCISE OF THE CITY AND COUNTY OF NEW YORK *v.* DAVID M. HOLLISTER.

A judgment obtained by default, and through inadvertence on the part of the defendant, will be opened, and a defence permitted, where he excuses his neglect and swears to merits.

Upon a motion for that purpose, where the defence is disclosed, and it appears that it is intended to be interposed in good faith, and is not clearly unjust or frivolous, the court will not decide whether it will prevail if established upon a formal trial of the action.

AT SPECIAL TERM, *April* 2, 1860.

Motion to open a judgment entered by default, and for leave to the defendant to answer. The action was to recover of the defendant the penalties imposed by law for selling liquors, in quantities less than five gallons at a time, without a license. In addition to the usual affidavit of merits, the defendant read, upon the motion, an affidavit excusing his neglect, and stated in it that his business consisted in part of selling liquors in large quantities; that he did, at times, sell wines—such as champagne, &c.—by the basket, but never sold less than five gallons in the aggregate to any one person, although that quantity was often composed of different kinds of wines or liquors, each kind being less than five gallons. It was contended, on the part of the plaintiffs, that this was a violation of the excise law, and therefore the affidavit disclosed no defence to the action.

John H. White, for the motion.

John B. Holmes and William McKeag, opposed.

HILTON, J.—Upon a motion to open a judgment entered against a defendant by default, and through his inadvertence, we do not determine absolutely whether the defence he desires to interpose will necessarily prevail at the trial, but merely look into it so far as to be able to say that it is not clearly frivolous;

and then if, in addition, we are satisfied that it is set up in good faith, and the neglect of the party is satisfactorily excused, it is almost a matter of course to permit him to come in and answer.

I see no reason for departing from this general practice in the present case, and therefore must decline passing upon the defence disclosed in the motion papers, as requested by the plaintiff's counsel, and content myself with merely saying that, in my opinion, the defence is clearly not frivolous.

The motion, therefore, to vacate the judgment, and for leave to answer, is granted on payment of $10 costs of the motion, and the disbursements in entering the judgment.

Ordered accordingly.

RICHARD REED, RECEIVER, &c. *v.* THOMAS BUTLER AND HARRIET E. BUTLER.

In an action against husband and wife, where her interest is separate and distinct from her husband's, a joint answer must be verified by both.

A joint answer of several defendants, who are not united in interest, must be verified by all.

AT SPECIAL TERM, *April* 2, 1860.

Motion to strike out a joint answer of husband and wife, for want of a sufficient verification. The action was brought by the plaintiff as receiver appointed in supplementary proceedings instituted by a judgment creditor of the defendant, Thomas Butler, to set aside a conveyance of certain property to the defendant Harriet, his wife, on the ground that it was purchased and paid for by him and with his money, and therefore the conveyance to the wife was void as to his creditors. The complaint was verified. The defendants answered jointly, denying that the

property was purchased and paid for by the husband, and claiming the property as the separate estate of the wife, and she alone verified the answer.

F. H. B. Bryan & Francis S. Bryan, for the motion, cited *Leavitt* v. *Cruger*, 1 Paige, 421; *Hilton* v. *Bennett*, 4 Simons, 17; 2 Barb. Ch. Pr. 88, 89, 150, 151, 152; *Perine* v. *Swaine*, 1 John. Ch. R. 24; *Chemical Co.* v. *Flowers*, 6 Paige, 654; *Andrews* v. *Storms*, 5 Sandf. S. C. 609; *Youngs* v. *Seely*, 12 How. 395.

Miller, Peel & Nichols, opposed.

DALY, First Judge.—The answer is not sufficiently verified. It purports to be the joint answer of both defendants, who are husband and wife, and is verified by the wife alone. If it is relied upon as the answer of both, it must be verified by both, because they are not united in interest, which is the only case under the Code where a joint answer can be verified by one of the parties only. If the conveyance by Howland to Mrs. Butler is valid, the land is her separate estate, which she has a right to dispose of independently of her husband. The action in that case would have to be dismissed, and her interest, upon that question, is separate and distinct from that which her husband has in the action. *Youngs* v. *Seely and wife*, 12 How. 395; *Andrews* v. *Storms*, 5 Sandf. 609. If the conveyance to her is held to be fraudulent, then she has no further interest in the action, as the relief asked for in that event, is that the land, or so much of it as may be necessary, be sold and applied to the payment of the judgment against Butler, a matter in which he alone has an interest. This motion, therefore, must be granted, with liberty to Mrs. Butler to put in a separate answer if she is so advised, or a joint answer verified by both defendants, upon the payment of $10 costs of this motion.

Ordered accordingly.

THOMAS CHAMBERS *v.* GEORGE LEWIS.

Where property has been wrongfully taken or detained, the owner may waive the tort and sue upon an implied promise to pay.

Formerly the tort was waived by bringing an action in assumpsit, but under the present system of pleading, the character of the action, and whether or not the tort is waived, must be determined by the facts stated in the complaint.

If, upon the facts so stated as constituting the cause of action, the plaintiff would be entitled to an order for the arrest of the defendant, the action will be considered as one founded in tort.

It seems that the demand for judgment in the complaint, and also the summons, may be referred to for the purpose of determining the character of the action brought.

A counter claim founded on contract cannot be interposed as a defence to an action to recover for property wrongfully taken and converted.

AT SPECIAL TERM, *April* 3, 1860.

Demurrer, by the plaintiff, to a counter claim set up in the defendant's answer. The complaint was in the following form:

The plaintiff shows unto the court that on the 30th day of March, 1859, at the city of New York, the plaintiff possessed and owned certain merchandise, consisting of four barrels of soap stone, of the value of twenty dollars; thirty-four barrels of red stone, of the value of one hundred and twenty dollars; and a large quantity of vulcanized gutta percha belting, of the value of five hundred dollars. That the defendant, on or about the day and year, and at the place last mentioned, obtained the said merchandise, and wrongfully converted the same to his own use. That the plaintiff has demanded the same of the defendant before the commencement of this action, to wit: on the 12th day of April, 1859, at the city of New York, and the defendant then and there refused to deliver the said merchandise to the plaintiff. Wherefore the plaintiff demands judgment against the said defendant for six hundred and forty dollars, with interest from the 12th day of April, 1859, and the costs of this action.

The answer commenced with a denial that the property men-

tioned in the complaint was in the possession of or owned by the plaintiff, as alleged, or that the defendant ever wrongfully converted it to his use. It then averred that the property belonged to the United States Vulcanized Gutta Percha Belting and Packing Company, and stated facts showing that the defendant was not in any way responsible for it. As a further answer, it was alleged that the defendant became possessed of the property under a valid purchase of it. Also, by way of counter claim, it was averred that the plaintiff was a stockholder, member and trustee of the Gutta Percha Company, a corporation created for manufacturing purposes under the laws of this state, and on and for some time prior to February 1st, 1859, was president thereof; that Augustus Cleveland recovered a judgment in the Marine Court, on March 15, 1859, against the company, for rent due February 1st, 1859; that the judgment had been docketed in the office of the county clerk, and an execution issued out of this court thereon had been returned unsatisfied, and the sum of $396.61, with interest, was due, and that the judgment was, on May 2, 1859, duly assigned to the defendant for a valuable consideration; that the certificate of incorporation of the company was filed in the clerk's office of Queen's county, by which the capital stock was fixed at $100,000; and the defendant alleged that the whole thereof had never been paid in; also, that the report required by law had never been filed; also, that with the assent of the plaintiff, as such trustee, the company had become indebted to various persons in an amount exceeding its capital; and therefore as stockholder, and also as trustee, the plaintiff was liable for the debts of the company, and is liable to pay the defendant the amount of the judgment.

The plaintiff demurred to so much of the answer of the defendant as alleged a counter claim against the plaintiff, because: 1st. The same does not state facts sufficient to constitute a cause of action in favor of said defendant against this plaintiff. 2d. The same does not state facts sufficient to constitute a cause of action by way of counter claim, in favor of said defendant against said plaintiff.

John T. Hoffman, for the plaintiff.

I. The action being trover, and not on contract, nothing can be counter claimed except it has arisen out of the transaction set forth in the plaintiff's complaint as the foundation of his claim, or unless it is connected with the subject of the action. Code, § 150, sub. 1.

II. Even if the action were on contract, yet the counter claim is not good, because it did not exist in favor of the defendant against the plaintiff at the commencement of the action. Code, § 150, sub. 2. This is the same rule which formerly applied to set-offs, as settled in *Carpenter* v. *Butterfield*, 3 J. C. 145; *Jefferson Co. Bank* v. *Chapman*, 19 J. R. 322.

III. Set-offs and counter claims are not allowed at all in actions of tort, (*Patterson* v. *Richards*, 22 Barb. 143), at least unless growing out of the immediate transaction mentioned in the complaint.

Cambreleng & Pyne, for the defendant.

I. The answer sets up facts sufficient to constitute a cause of action. 1. An assignee has the right to sue upon a judgment, without leave first obtained. *Tafts* v. *Braisted*, 1 Abb. Pr. R. 84. 2. Stockholders may be sued on a judgment against the company of which they are members, after execution returned unsatisfied. Laws of 1853, p. 283; *Peckham* v. *Smith*, 9 How. Pr. R. 436; *Glee* v. *Bloomer*, 20 Johns. 669; *Moss* v. *McCullough*, 7 Barb. 279. 3. The facts stated show a liability on the part of the plaintiff. Rev. Stat., part 1, ch. 18, title 12, art. 2d, §§ 32, 34, 35, 36; *Brown* v. *Harmon*, 21 Barb. 510; 1 Chitty on Pleadings, 218, and cases cited. 4. And the defendant is entitled to sue as assignee. Code, § 111; *Hoyt* v. *Thompson*, 1 Seld. 347.

II. The answer states facts sufficient to constitute a cause of action, by way of counter claim. 1. It states a cause of action existing in favor of the defendant, and against the plaintiff. 2. The complaint and the counter-claim are both on contract. *a*. The complaint demands judgment for the value of the goods, with interest; therefore it is a waiver of the tort and a demand

on the implied contract. *Hinds* v. *Tweddle*, 7 How. Pr. R. 278; *Dows* v. *Green*, 8 How. Pr. R. 377. *b.* Our claim is on a judgment, and therefore on contract; the judgment was also for a contract debt. *c.* It existed at the commencement of the action. 3. Whether on contract or not, it is a good counter claim because connected with the subject of the action. *Zenia Branch Bank* v. *Lee*, 7 Abb. Pr. R. 372; *Lemon* v. *Trull*, 18 How. Pr. R. 248.

III. The facts set up, even if not constituting a valid counter claim, are not demurrable if admissible as a defence. The right of demurring to the answer only exists where it does not constitute either a counter claim or defence. Code, § 163; *Zenia Branch Bank* v. *Lee*, 7 Abb. Pr. R. 372; *Gottler* v. *Babcock*, N. Y. C. P., Spl. Term, 1858. The demurrer is therefore insufficient, for not stating all the grounds necessary.

BRADY, J.—It seems to be settled, upon principle and the weight of authority, that, where goods are wrongfully taken or detained, the plaintiff may waive the tort, and bring an action upon an implied promise to pay for them. *Butts* v. *Collins*, 13 Wend. 154; *Putnam* v. *Wise*, 2 Hill, 140, and cases cited in note; *McKnight* v. *Dunlop*, 4 Barb. S. C. R. 36; *Carey* v. *Green*, 8 How. Pr. R. 376; *Hinds* v. *Tweddle*, *&c.*, 7 How. Pr. R. 278. But an examination of the cases will show that where the tort was waived, the action was in form not trover, but assumpsit. Under the Code, assuming the right of election to exist, there is a difference in the remedy. If the action be for wrongfully taking or detaining property, the defendant may be arrested; but not if it be to recover a sum of money arising upon contract, unless the defendant was guilty of a fraud in contracting the debt. It may be that the conversion of property would be a fraud, for which the defendant could be arrested, and that the right to arrest would exist although the action were for money due, as upon a sale or purchase of the goods converted; but I do not think the courts would extend the remedy to such a case. The debt referred to must be one expressly contracted, and not one growing out of implied obligations, or created by operation

of law. But how is the election to be determined in cases under the Code? The complaint must state the facts constituting the cause of action, and they are, that the defendant took or detains property of the value of a sum named; and the prayer is for judgment for the value of the property, with interest. In trover, under the old system of pleading, the declaration was very different from the declaration in assumpsit for goods sold, and there could be no difficulty in determining the form in which the plaintiff presented his demand. He must now recover upon the facts, and if his summons be for a money demand on contract, there can be no doubt of his election; but the summons forms no part of the pleadings, and I cannot, by reference to it, determine whether the plaintiff has elected what form his action shall assume. The prayer for relief may sometimes determine the question, and, I think, does in this case. The plaintiff prays judgment for the sum of six hundred and forty dollars, which is the value of the property detained, with the interest thereon. This is precisely what the law of damages would give him in an action to recover for the wrongful detention of the property, leaving the question of value open to dispute. *Stevens* v. *Lowe*, 2 Hill, 132; *Dellenback* v. *Jerome*, 7 Cow. 294; *Kennedy* v. *Strong*, 14 J. R. 128. It is true, that such would be the rule if the action were to recover as for goods sold, although the pleader might then allege the goods reasonably worth the sum named. In this case, the plaintiff insists that the action is in tort, in the nature of the old action of trover, and the defendant insists that it is not. In form, under the Code, it may be either, because the facts are the same; but it is clear that on the complaint the plaintiff would be entitled to an order of arrest, and the action must be regarded as of the character claimed by him. It may be that the defendant is right, but he has proceeded upon the supposition that the complaint was, in form, one not only for the recovery of the value of the goods converted, but one in which the tort was waived. I have been unable to arrive at such a conclusion, although I have given this case a great deal of attention and consideration. I thought the

question very embarrassing, and the views which I have adopted not having been suggested on the argument of the demurrer, I have been more cautious and deliberative in making them the basis of my judgment. If the defendant had produced the summons, the result might have been different.

Judgment for the plaintiff on the demurrer.

HENRY V. VULTE *v.* JAMES P. WHITEHEAD, JR.

Supplementary proceedings cannot be instituted upon a judgment recovered in a justice's or district court for an amount less than $25, exclusive of costs.

On such a judgment an execution can issue only against the personal property of the debtor.

Such proceedings are only allowed upon the return of an execution unsatisfied in whole or in part, issued to a sheriff, against the real and personal property of the debtor.

The case of *Candee* v. *Gundelsheimer* (17 How. P. R. 434) disapproved.

AT CHAMBERS, *June* 14, 1860.

Motion to set aside an order for the examination of a judgment debtor in proceedings supplementary to execution. It appeared that the plaintiff commenced an action against the defendant in a district court, and judgment was rendered in favor of the defendant for $10.75 costs. A transcript having been filed in the office of the county clerk, an execution was issued out of this court to the sheriff of the county, and returned unsatisfied. On an affidavit stating these facts an order was granted, requiring the plaintiff to appear and be examined concerning his property. The plaintiff moved to set aside the order, and all proceedings thereon.

Henry V. Vulte, in person, for the motion.

E. R. Bogardus, opposed, cited *Candee* v. *Gundelsheimer*, 17 How. P. R. 434.

HILTON, J.—Supplementary proceedings can only be instituted upon a justice's or district court judgment when it exceeds in amount $25, exclusive of costs, and a transcript thereof has been filed in the office of the clerk of the county in which an execution against the real and personal property of the defendant has been issued to the sheriff, and returned by him unsatisfied in whole or in part, (Code, §§ 292, 464); and the execution must have been in the form prescribed by § 289, sub. 1.

When the judgment is for a less sum, § 63 permits a transcript to be filed with the clerk of the county in the same manner, and from the time of such filing the judgment becomes a judgment of the county court, except that it is not a lien upon, and cannot be enforced against, real property; and therefore, as no execution thereon can be issued in the form prescribed by § 289, sub. 1, nor of the kind referred to in § 292, proceedings supplementary cannot be instituted upon it.

Section 48 of the District Court Act (Laws of 1857, p. 707,) makes these provisions of the Code applicable to the judgments of those courts.

In the present case the judgment was recovered against the plaintiff for $10.75 costs in a district court in this city, and although the affidavit, upon which the order for his examination was granted, states that a transcript of the judgment was filed with the county clerk, and an execution against his property has been issued to and returned by the sheriff of this county unsatisfied, yet it must be assumed that the execution was only against the personal property of the plaintiff, as none other could properly be issued upon the judgment recovered.

As I have already remarked, the return of such an execution unsatisfied cannot be the basis of supplementary proceedings under § 292, and the proceedings instituted in this case must therefore be dismissed.

The case of *Candee* v. *Gundelsheimer*, (17 How. P. R. 434), relied on to sustain the order, certainly goes to the extent of holding that such proceedings may be had in all cases where a transcript of a justice's judgment for any amount has been filed

with the county clerk, and an execution has been issued thereon to the sheriff and returned unsatisfied in whole or in part; but upon examination it will be seen that the judge, in making that decision, has failed to notice the distinction to which I have alluded respecting the kind of execution which may be issued upon a justice's judgment for less than $25, exclusive of costs, and the fact that the execution referred to in § 292, and the return of which unsatisfied forms the basis of supplementary proceedings, must be against property generally, and in the form prescribed by § 289.

Proceedings dismissed.

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AGREEMENT.

1. The defendant, as a condition of the purchase by him of all the property of a mining company, of which he was treasurer, agreed to pay its liabilities, and to pay the shareholders a specified amount for each share. *Held*, in an action brought by the plaintiff, claiming under an assignment of the interest of one of the shareholders, I. That the promise of the defendant enured to the benefit of every shareholder and creditor of the association, and entitled any one of them to maintain an action upon it. II. That the promise was not to pay the debt of another, but a promise to pay his own debt incurred by the purchase of the property. *Therasson* v. *McSpedon*, 1

2. F. applied to S. for certain rooms and board. Negotiations were entered into between them, which finally resulted in F.'s taking the rooms and paying $10 to bind the bargain, S. giving a receipt therefor in these words: "Received from —— —— ten dollars, which amount secures him board for self and lady, and is to be applied on the first week's board; to be forfeited if not taken" Prior to giving this receipt, S. had made no agreement to reserve the rooms for F. *Held*, I. That the receipt constituted a contract in writing, merging all prior parol negotiations, and was not liable to be varied by parol. II. That any prior agreement, made by F., to take the rooms, was void for want of mutuality, under the familiar rule of law that an agreement consisting of mutual promises must be binding upon both parties to it, or it will bind neither. III. That the sum of $10 was, by the receipt, agreed upon as in the nature of liquidated damages, and was the extent of F.'s liability upon his failure to take the rooms according to agreement. *Townsend* v. *Fisher*, 47

3. Where an instrument is partly written and partly printed, the manuscript portions must control. *Woodruff* v. *Commercial Mutual Ins. Co.*, 122

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1. Where a verified complaint alleges matter, to the truth of which the defendant, if a witness, would be privileged from testifying, an answer denying such allegations, may be served without being verified. *Molcney* v. *Dows*, 247

2. An answer consisting of averments false in fact, is a sham pleading. A pleading is irrelevant which consists of matter having no substantial relation to the subject of the controversy. A frivolous answer is one which, assuming its contents to be true, presents no defence to the action. *Struver* v. *Ocean Ins. Co.*, 475

3. In an action against husband and wife, where her interest is separate and distinct from her husband's, a joint answer must be verified by both. A joint answer of several defendants, who are not united in interest, must be verified by all. *Reed* v. *Butler*, 589

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CORPORATIONS.

1. *It seems* that municipal corporations are not responsible for injuries to third persons arising from the negligence, want of skill, or carelessness of contractors, or those employed under them, while engaged in the prosecution of repairs upon the streets of the city. But it is otherwise where the injury is occasioned, not by any fault of the contractor or his servants, but is the result of an act which the corporation, by their contract, direct to be done. In such a case, the principle of *respondeat superior* applies. Where the contractor has merely done what he was required to do by the contract, he is not the party to be made responsible; but those who directed him to do the act must answer for the damage occasioned thereby. *Lockwood* v. *Mayor, &c., of N. Y.*, 66

2. A non-resident plaintiff cannot maintain an action in this court against a foreign corporation unless it appears that the action is upon a contract made, executed, or delivered in this state, or that the cause of action arose, or the subject of the action is situate, within this state. *Harriott* v. *New Jersey RR. & Trans. Co.*, 262

3. The provisions of law allowing parties to be witnesses in their own behalf, are applicable to actions wherein a municipal corporation is a party. *Mott* v. *The Mayor, &c., of N. Y.*, 358

4. A municipal corporation is liable for the damages occasioned by its illegal exercise of a corporate power. *Ibid.*

5. A municipal corporation is a living party within the meaning of section 399 of the Code, and in an action against it, the plaintiff may be examined as a witness in his own behalf. *Wallace* v. *The Mayor, &c., of N. Y.*, 440

CORPORATION ORDINANCES.

1. The common council of the city of New York, upon the application of less than two thirds of the owners affected, passed an ordinance changing the grade of Vandewater street. In carrying the ordinance into effect, they caused the street to be excavated to the depth of six feet, whereby the premises of the plaintiff fronting on it were seriously injured. *Held*, that the ordinance was void, and the corporation was liable for the injury produced. *Mott* v. *The Mayor, &c., of N. Y.*, 358

2. In passing an ordinance changing the grade of a street, the common council of this city act under a special and limited power, and where it is shown that the facts did not exist which would warrant its exercise, the ordinance is not only void, but affords no protection to any person acting under it. *Ibid.*

COSTS.

1. In all actions for the recovery of money, unless the plaintiff recovers $50 or more, the defendant is entitled to costs, of course. *Crane* v. *Holcomb*, 269

2. In an action upon a promissory note for $750, a set-off, or counter claim, exceeding that amount, was interposed as a defence. The plaintiff recovered but $26. *Held*, I. That his right to costs was not determined by his being the prevailing party in the suit, but was dependent upon the actual amount recovered. II. His recovery being under $50, the defendant was entitled to costs. III. That a judgment entered in favor of the defendant for his costs, after deducting the sum found due the plaintiff, was regular.

The case of *Kalb* v. *Lignot*, (3 Abbott P. R. 190), *contra*, disapproved. *Ibid.*

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2. A bargain between the plaintiff in an execution, and the officer holding it, for the payment of a compensation beyond that allowed by law for the collection, is void. *Ibid.*

3. *It seems*, that the indorsement by the sheriff upon an execution, of a levy made under it, is an official act, and *prima facie* evidence of the facts stated. *Coddington* v. *Carnley*, 528

EXECUTORS AND ADMINISTRATORS.

1. A sole acting executor can maintain an action respecting the property of the testator. In actions by or against executors, it is not necessary to join, as parties, those named as executors in the will, but to whom letters testamentary have not been granted, and who have not qualified. *Moore* v. *Willett*, 512

EXPRESS COMPANIES.

1. Express companies who receive and agree to transport goods or packages from place to place for hire, in the ordinary and approved means of conveyance, are common carriers, although they are not owners of, nor interested in, the conveyances by which the goods are transported,—disapproving *Herefield* v. *Adams*, 19 Barb. 577. *Place* v. *Union Express Co.*, 19

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1. A general assignee for the benefit of the creditors of an insolvent is not to be regarded as a purchaser for a valuable consideration, in respect to the property assigned, but holds it subject to the same equities which existed against it at the time of the execution of the assignment.

In an action brought by him to recover a debt thus assigned, any set-off is available as a defence which might have been interposed had the suit been brought in the name of the assignor, and whatever would be a valid defence against the claim in the hands of the assignor, is equally so to an action by the assignee. *Maas* v. *Goodman*, 275

2. The provisions of the Two Thirds Act (3 R. S., 5 ed, 93, § 7,) which require the petition of the insolvent to the judge, to be accompanied by the affidavit of each petitioning creditor, stating the nature of his demand, with the general ground and consideration of such indebtedness, is not complied with by an affidavit merely stating a sum to be justly due from the insolvent for two promissory notes given for an amount specified. And where the affidavit of one of the petitioning creditors, whose demand was necessary to be included to make up the required two thirds in amount of all the debts owing by the insolvent, gave no other statement of indebtedness; *held*, that the judge to whom the petition was presented acquired no jurisdiction to proceed under the act, and the discharge granted by him was void. *Gillies* v. *Crawford*, 338

3. *It seems*, that if the insolvent, in his petition, or the petitioning creditor, fails to set forth the consideration of the indebtedness, the omission, in either case, is subject to the same rule of law; and the judge to whom the petition may be presented will acquire no jurisdiction to proceed under the act referred to. *Ibid.*

INSURANCE.

1. A policy of marine insurance contained a provision (in the memorandum clause) that all goods were "warranted by the insured free from damage or injury from dampness, change of flavor, &c., except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." A cargo of grain, shipped in one bulk under this policy, was damaged —one portion by actual contact with sea water, and another portion by dampness or sweat communicated from that part of the cargo which was actually wet. *Held*, that the insured were entitled to recover for all the damage done by the contact with sea water, whether caused by immersion in the water, or by dampness communicated to the upper portion, from contact of sea water with the lower portion. *Woodruff* v. *Com. Mutual Ins. Co.*, 122

2. A policy of marine insurance contained, in the body thereof, a clause in manuscript making "grain subject to average, if damaged ten per cent." The printed memorandum clause annexed to the policy warranted "grain free from average, unless general;" and further warranted it "free from damage or injury from dampness, change of flavor, &c., except caused by actual contact of sea water with the articles damaged, occasioned by

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